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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 638

CHENG FAN KWOK (A15 355 927),

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1967
CERTIORARI GRANTED JANUARY 29, 1968

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Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Case No. 16,005

DATE	FILINGS—PROCEEDINGS
1966	
June 24	Petition for Review of an Order of the Board of Immigration Appeals, filed. (6 copies) Proof of service in letter of June 23, 1966.
	Copy of Petition for Review mailed to Attorney General of the United States.
	Copy of Petition for Review mailed to District Director of Immigration & Naturalization Service at Philadelphia, Pa.
Aug. 5	Certified Administrative Record, filed. (rec'd. from U. S. Attorney's Office in Philadelphia, Pa.).
1967	
Jan. 5	Brief and appendix for petitioner, filed. (4 copies).
Feb. 3	Brief for respondent and appendix, filed. (4 typed copies). Proof of service in letter of 2/7/67.
Mar. 3	Motion by respondent for leave to file supplemental brief, filed. (1 copy). No objection by opposing counsel in letter of 3/3/67.
Mar. 9	Order (*McLaughlin*, Hastie and Freedman, Circuit Judges) granting respondent's motion for leave to file supplemental brief on or before March 17, 1967, filed.

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
1967	
Mar. 16	Supplemental Brief for Respondent, filed.
Mar. 20	Argued. Coram: Staley, Chief Judge and Kalodner and Smith, Circuit Judges.
Aug. 4	Opinion of the Court (*Staley,* Chief Judge and Kalodner and Smith, Circuit Judges), filed. (Covers.16005 and 16027).
Aug. 4	Judgment dismissing the petition for review of the decision of June 20, 1966 of the Immigration and Naturalization Service for lack of jurisdiction, filed.
Sept. 1	Order (*Staley,* Chief Judge) staying issuance of the mandate until September 18, 1967, filed.
Sept. 21	Certificate of filing (on September 20, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 638, O.T. 1967).
Sept. 26	Notice of filing (On September 20, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 638, O.T. 1967).
1968	
Feb. 2	Certified copy of order (dated January 29, 1968) granting petition for writ of certiorari and placing case on summary calendar, etc., filed. (S. C. No. 638, O.T. 1967).

Petition to Review

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

CHENG FAN KWOK (A15 355 927),

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

TO THE HONORABLE JUDGES FOR THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

Your petitioner, by his attorneys, alleges:

1. That the United States Court of Appeals for the Third Circuit has jurisdiction of this petition under the provisions of Public Law 87-301, 8 U. S. C. 1105(a).

2. That the petitioner resides in Newark, New Jersey, and is within the jurisdiction of this Court.

3. That the respondent herein has his office within the jurisdiction of the United States Court of Appeals for the Third Circuit.

4. That the petitioner is a native and citizen of the Republic of China. Petitioner has continuously resided in the United States since November 24, 1965, when he entered the United States at the Port of San Pedro, California.

5. That the petitioner submitted an application to the respondent asking that he be classified as a refugee pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended, in that, he is a refugee from a Communist-dominated country, to wit: the Mainland of China. That the reason he submitted the application to the District Director in New Jersey is that, upon information and belief, there is no procedure for filing such an application in Hong Kong. That the petitioner submitted an application for a stay of deportation so that he may have his application under Section 203(a)(7) of the Immigration and Nationality Act considered in the United States. That this application for a stay of deportation was denied. That a copy of this order is annexed hereto.

6. That the denial was arbitrary, capricious, and an abuse of administrative discretion, illegal and in violation of law.

7. That the petitioner will be adversely affected because, if he is returned to Hong Kong, he will not be able to make an application as a refugee pursuant to Section 203 (a)(7) of the Immigration and Nationality Act and, therefore, would not be able to return to the United States.

8. That the petitioner has fully and completely exhausted each and every one of his administrative remedies and must seek direct recourse to the Court to declare the Acts and Regulations of the respondent illegal in denying the petitioner the right to have his classification as a refugee

determined in the United States pursuant to Section 203 (a)(7) of the Immigration and Nationality Act of 1952, as amended.

9. That no previous application has been made to this or any other court for the relief requested herein.

WHEREFORE, your petitioner respectfully prays that the order of the respondent be cancelled and that the petitioner be granted a stay of deportation pending a determination of his classification as a refugee pursuant to Section 203 (a)(7) of the Immigration and Nationality Act of 1952, as amended.

Respectfully submitted,

LEBENKOFF & COVEN
Attorneys for Petitioner
33 West 42nd Street
New York, N. Y. 10036

Order Denying Stay of Deportation

A15 355 927 DB

1060 Broad Street
Newark, New Jersey 07102

June 20, 1966

Mr. Cheng Fan Kwok
186 Mulberry Street
Newark, New Jersey

Dear Sir:

Reference is made to your "Application for Stay of Deportation" (Form I-246) submitted this date in which you request a stay of deportation to permit the submission of an application for adjustment of your immigration status pursuant to Section 203(a)(7) of the Immigration and Nationality Act.

Published regulations of this Service require that "the provisions of Section 245 of the Act shall govern the adjustment of status provided for in the proviso to Section 203(a)(7) of the Act". Section 245 of the Immigration and Nationality Act is not available to aliens who gained entry into the United States as crewmen. Consequently, you are ineligible to apply for adjustment of status in the United States.

Order Denying Stay of Deportation

In view of the foregoing your request for a stay of deportation is denied.

Sincerely,

W. J. Wyrsch
Acting District Director

(Initials Illegible)

cc: Jules E. Coven, Esquire
33 West 42nd Street
New York, New York

Application for Stay of Deportation

(See opposite) ☞

Form approved.
Budget Bureau No. 43-R402.2

United States Department of Justice
Immigration and Naturalization Service

APPLICATION FOR STAY OF DEPORTATION

SUBMIT IN DUPLICATE
Read instructions on reverse before filling out application

Fee Stamp

RECEIVED
1966 JUN 20 PM 4:17
I&NS, NEWARK, N.J.

File No. A15 355 927

Date June 20, 1966

1. Name (Family Name in Capital letters)	(First Name)	(Middle Name)
CHENG	FAN	KWOK

2. Present Address (Apt. No.) (Number and Street) (Town or City) (State) (Zip Code)

186 Mulberry Street, Newark, New Jersey

3. Country of Citizenship	4. Date to which passport is valid (Attach passport)
China	
5. Country to which deportation has been ordered	6. Date to which stay of deportation is requested
Hong Kong	pending determination of classification as a refugee pursuant to Section 203(a)(7).

7. Reasons for requesting stay of deportation:

I hereby request a stay of deportation pending a determination of my classification as a refugee pursuant to Section 203(a)(7) of the Immigration and Nationality Act. I do not believe that I can make this application for classification in Hong Kong where I am to be deported to. Since I fled from a Communist-dominated country, to wit: the Mainland of China, I feel I am eligible to be classified as a refugee. I will depart from the United States as soon as my classification is determined.

8. I certify that all the statements I have made in this application are true and correct to the best of my knowledge and belief.

Chung Jan Kwok (Signature of Applicant) — New York, N.Y. (Dated at) — June 20, 1966 (Date)

9. SIGNATURE OF PERSON PREPARING FORM, IF OTHER THAN APPLICANT

I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.

(Signature) (Address) (Date)

APPLICANT: DO NOT WRITE BELOW THIS LINE

Stay denied/granted until _____ by W. J. Weyrich

FORM I-246 (Rev. 11-30-64)

98

FORM APPROVED.
BUDGET BUREAU NO. 43-R427.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

APPLICATION FOR CLASSIFICATION AS A REFUGEE

(Under the proviso to Section 203(a)(7), Immigration and Nationality Act as amended)

File No. A15 355 927

APPLICANT TO FURNISH THE FOLLOWING INFORMATION (*SEE INSTRUCTIONS ON REVERSE*)

TYPE OR PRINT

1. My name is:	First	Middle	Last
	FAN	KWOK	CHENG

2. I reside in the United States at: (Apt. No.) (No. and Street) (City) (State) (ZIP Code)
186 Mulberry Street, Newark, New Jersey

3. I was born in: (City or Town) (Province) (Country)
Foochow — China

4. I am:
- [X] Male
- [ ] Female

Marital status:
- [ ] Single
- [X] Married
- [ ] Divorced
- [ ] Widowed

5. My Father's name and address is:
Ting Kwong, Deceased

6. My Mother's name and address is:
Lam Yuk, Deceased

7. My spouse resides at: (City or Town) (Province or State) (Country)
Hong Kong — B.C.C.

8. Date married: 1942
Place married: (City or Town) Foochow (Province or State) (Country) China

9. I fled or was displaced from (Name of Country) on or about (month) (day) (year) for the following reasons (state in detail):
I fled from the Mainland of China in 1956 because the Communists took control of that country and I am unwilling to return to a country that is Communist-dominated.

10. I am unwilling or unable to return to the country from which I fled or was displaced because: Reasons: (State in detail).
I am ant-Communist and I do not wish to live in a Communist-dominated country.

11. In the spaces below, list all of your entries into and departures from the United States. (Show your last entry FIRST.)

ENTRIES		DEPARTURES	
DATE	PORT	DATE	PORT
Nov. 24, 1965	San Pedro, Calif.		
(2 prior entries)			

Form I-590 A
(1-25-66)

10a

12. I ☐ have ☐ have not been absent from the United States during the past two years.

Clang Jun Kuok
(Signature of Applicant)

June 20, 1966
(Date of Signature)

Signature of person preparing form, if other than applicant.	Address of person preparing form, if other than applicant
I declare that this document was prepared by me at the request of applicant and is based on all information of which I have any knowledge.	Occupation:

DO NOT WRITE BELOW THIS LINE

INTERVIEWED ON DATE: AT:	☐ APPROVED. IMMIGRANT VISA NUMBER IS ALLOCATED TO APPLICANT PURSUANT TO THE PROVISO TO SECTION 203(a)(7), IMMIGRATION AND NATIONALITY ACT, AS AMENDED. ☐ DISAPPROVED BECAUSE
Immigration Officer	Date / District Director

INSTRUCTIONS

This form must be executed, signed and submitted in one copy with your Application for Status as a Permanent Resident, Form I-485, if you are claiming preference classification as a refugee. A separate form must be submitted for each member of your family who is claiming such classification. The form shall be executed by the parent or guardian of a child under 14 years of age.

1. INTERVIEW - The person who executes this form will be required to appear for an interview before an an immigration officer. The interview may be waived in the case of a child under 14 years of age.

2. PENALTIES - Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact or using any false document in the submission of this application.

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PAGE

Decision of the Special Inquiry Officer

File No. A15 355 927

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

In Deportation Proceedings Under Section 242
of the Immigration and Nationality Act

In the Matter of

CHENG FAN KWOK,

Respondent.

The above-named respondent having appeared before me for hearing on this date, pursuant to the Order to Show Cause in this proceeding, and having admitted that the factual allegations contained therein are true, and having further admitted that (s)he is deportable from the United States on the charges set forth therein, I am satisfied and have concluded that deportability has been thereby established.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government within such time and under such conditions as the district director shall direct.

Decision of the Special Inquiry Officer

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to Hong Kong on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory, the respondent shall be deported to Rep. of China (on Taiwan).

WILLIAM TAFFET
(Special Inquiry Officer)

Date: 3/3/66

Place: Newark, N. J.

Copy of this decision has been served on the respondent.

Appeal: reserved

Time expires 3/14/66.

WILLIAM TAFFET
(Special Inquiry Officer)

Order Dismissing Appeal by Board of Immigration Appeals

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

Apr 5 1966

File: A-15355927—Newark

In re: CHENG FAN KWOK

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Jules E. Coven, Esq.
Lebenkoff & Coven
33 West 42nd Street
New York, N. Y. 10036

CHARGES:

Order: Section 241(a)(2), I&N Act (8 USC 1251 (a)(2))—Nonimmigrant crewman—remained longer

Lodged: None

APPLICATION: Voluntary departure

This case relates to a native of China and a citizen of the Republic of China, age 47, who has resided in the United States since his arrival at San Pedro, California, on or about November 24, 1965, as a crewman authorized to remain in the United States as long as the vessel on

which he arrived remained in port, but in no event to exceed 29 days. The respondent has remained in the United States without authority since at least December 24, 1965.

The respondent's deportability was conceded through counsel. The special inquiry officer, by order dated March 3, 1966, granted respondent the privilege of voluntary departure and further ordered that if the respondent failed to depart when and as required, that the privilege of voluntary departure should be withdrawn without further notice or proceedings and the respondent be deported to Hong Kong on the charge contained in the Order to Show Cause, and alternatively to the Republic of China on Taiwan. The respondent's wife and four children now reside in Hong Kong.

Despite conceding deportability, the respondent's counsel on appeal contends that the special inquiry officer had no authority to designate "a country of deportation" since he does not have the power to do so. It was further contended that the enabling regulations 8 CFR 242.8 and 8 CFR 242.18(c) are in violation of law in that they give the special inquiry officer more power than he is permitted to have pursuant to Section 242(b) of the Immigration and Nationality Act.

Counsel's argument has heretofore been rejected. Accordingly, the appeal will be dismissed and the order of the special inquiry officer affirmed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

THOS. S. FINUCANE
Chairman

Demand for Surrender of Alien

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

1060 Broad Street
Newark, New Jersey 07102

File: A15 355 927 DB

Date: June 16, 1966

Stuyvesant Insurance Company
786 Broad Street
Newark, New Jersey

Re: CHENG FAN KWOK

Gentlemen:

Pursuant to the terms of the bond posted by you for the release from custody of the above-named alien(s), demand is hereby made upon you to surrender such alien(s):

☐ for hearing at the following time and place.

Time: Place:

☐ into the custody of an officer of this Service at 1060 Broad Street, Newark, New Jersey—Room 460 on June 20, 1966 at 8:30 AM for deportation.

You are informed that failure to surrender the alien(s) in accordance with this demand will result in steps being

taken toward the breaching of the above mentioned bond and its forfeiture to the Government.

cc: Mr. Cheng Fan Kwok
186 Mulberry Street
Newark, New Jersey

Jules E. Coven, Esq.
33 West 42nd Street
New York, New York

Very truly yours,

DOMINICK F. RINALDI
District Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,005

CHENG FAN KWOK (A15 355 927),

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition to Review Decision of the Immigration and Naturalization Service

Present:

STALEY, *Chief Judge,* and
KALODNER and SMITH, *Circuit Judges.*

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review of the decision of June 20, 1966 of the Immigration and Naturalization Service in this case be, and the same is hereby dismissed for lack of jurisdiction.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

August 4, 1967

Opinion of the Court of Appeals, Third Circuit

(Filed August 4, 1967)

By STALEY, *Chief Judge.*

These proceedings were commenced in this court to review decisions of the district director of the Immigration and Naturalization Service in Newark, New Jersey. The district director had denied petitioners' applications for stays of deportation pending disposition of their applications for adjustment of status pursuant to §203(a)(7) of the Immigration and Nationality Act (hereinafter referred to as the "Act"), 8 U. S. C. §1153(a)(7) (Supp. II, 1966).

The petitioner in No. 16027, Chan Kwan Chung, a citizen of China, entered the United States on March 29, 1964. As a crewman, he could remain in this country only as long as his vessel was in port but not in excess of 29 days. 8 U. S. C. §1282(a). He remained longer than permitted, and deportation proceedings were commenced against him in July of 1964.[1] Chung apparently conceded his deportability but sought permission to depart voluntarily. His request was denied. No appeal was lodged with the Board of Immigration Appeals.

Chung was ordered to surrender for deportation to Hong Kong on July 7, 1966. On July 5, two days before he

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[1] The facts in the Kwok case, No. 16005, are similar: Cheng Fan Kwok, a citizen of China, entered the United States as a crewman on November 24, 1965. He was ordered deported on May 16, 1966, and was granted permission to depart voluntarily. He did not depart voluntarily and was ordered to surrender for deportation on June 20, 1966. On that date, he filed an application with the district director for a stay of deportation pending the submission of an application for adjustment of status under §203(a)(7). The application for a stay was denied.

was to be deported, he filed an application for a stay of deportation with the district director in Newark. The reason asserted for the stay was to permit him time to submit an application for adjustment of status pursuant to a recent amendment to the Immigration and Nationality Act, §203(a)(7). The district director denied the application, stating that under the published regulations of the Service, 8 C. F. R. §245.4, adjustment of status under §203(a)(7) is governed by §245 and that crewmen are excluded from adjusting their status under §245.

Two issues are presented by these petitions for review. The first is whether this court has jurisdiction to entertain the petitions, and the second is whether crewmen are eligible to adjust their status under §203(a)(7). We deal first with the question of jurisdiction since a decision on this point adverse to the petitioners would render unnecessary a consideration of the merits of each petition.

Both the petitioners and the Immigration and Naturalization Service urge that this court has exclusive jurisdiction to review the district director's decisions. Our earlier decisions to the contrary in Lam Man Chi v. Bauchard, 314 F. 2d 664 (C. A. 3, 1963), and Scalzo v. Hurney, 314 F. 2d 675 (C. A. 3, 1963), should not be accorded any weight in light of our reliance on and the subsequent reversal of the Second Circuit case of Foti v. INS, 308 F. 2d 779 (1962), *rev'd*, 375 U. S. 217 (1963). The statute, §106(a) of the Act, which confers jurisdiction on the courts of appeals to review orders of deportation and exclusion provides:

> "The procedure prescribed by, and all the provisions of sections 1031-1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the

> judicial review of all final orders of deportation * * * made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [§242(b) of the Act] or comparable provisions of any prior Act * * *." 8 U. S. C. §1105a(a).

The question before the Supreme Court in the *Foti* case was whether a denial of discretionary relief under §244(a)(5) of the Act (suspension of deportation) was a "final order of deportation" within the meaning of §106(a). Premising its conclusion on the legislative history of §106(a) and its purpose, the Court held that the denial of §244(a)(5) relief was reviewable in the court of appeals. The Court said that the purpose of §106(a) was to "abbreviate the process of judicial review" by creating " 'a single separate, statutory form of judicial review of administrative orders for the deportation of * * * aliens.' " 375 U. S. at 224-25. The Court also noted that Congressmen knowledgeable in immigration matters had stated in debate that a final order of deportation should include ancillary determinations such as applications for discretionary relief which were made in the same proceeding. Finally, the Court concluded that bifurcation of judicial review—review of the deportation order in the court of appeals and review of the denial of discretionary relief in the district court—was wholly inimical to the purpose of legislative history of the statute.

Though the Supreme Court in *Foti* placed considerable reliance on the fact that applications for discretionary relief are traditionally tried in one and the same proceeding with the rule to show cause why the alien should not be deported, it admitted that in a large percentage of cases deportability is conceded and that the only question before

the special inquiry officer is whether the application for discretionary relief should be granted. The Court also mentioned the other types of applications for discretionary relief, in addition to those under §244(a)(5), which would be reviewable in the courts of appeals:

> "* * * [I]t seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to §244(e) and orders denying the withholding of deportation under §243(h), are likewise included within the ambit of exclusive jurisdiction of the Courts of Appeals under §106(a)." 375 U. S. at 229.

The Court left open the question of whether the denial of a motion to reopen the deportation proceedings is reviewable by the court of appeals. It subsequently decided that question in the affirmative in a per curiam opinion. Giova v. Rosenberg, 379 U. S. 18 (1964), *reversing* 308 F. 2d 347 (C. A. 9, 1962).

Since *Foti* and *Giova,* there have been a number of decisions in the courts of appeals and the district courts dealing with the jurisdictional reach of §106(a). The Seventh Circuit has adhered to its pre-*Foti* decisions of Blagiac v. Flagg, 304 F. 2d 623 (C. A. 7, 1962), and Roumeliotis v. INS, 304 F. 2d 453 (C. A. 7), *cert. denied,* 371 U. S. 921 (1962), which hold that any administrative determination that involves the execution or suspension of the deportation order is ancillary to that order and is reviewable in the court of appeals. Melone v. INS, 355 F. 2d 533 (C. A. 7,

1966); Skiftos v. INS, 332 F. 2d 203 (C. A. 7, 1964). The Sixth Circuit also appears to have adopted that construction of the Act. Talavera v. Pederson, 334 F. 2d 52 (C. A. 6, 1964). The Seventh Circuit's position has, however, been rejected by the Fifth, Eighth and Second Circuits. Samala v. INS, 336 F. 2d 7 (C. A. 5, 1964); Mendez v. Major, 340 F. 2d 128 (C. A. 8, 1965); Tai Mui v. Esperdy, 371 F. 2d 772 (C. A. 2, 1966), *cert. denied*, —— U. S. —— (1967).[2]

Conflicting interpretations of §106(a) in the lower courts is exemplified by the division within one district court in this circuit. Judge Coolahan of the district court in New Jersey has held in Cheng Ho Mui v. Rinaldi, 262 F. Supp. 258 (D. N. J. 1966), that jurisdiction to review a district director's denial of a stay of deportation is in the district court rather than in the court of appeals. In so holding, he rejected the position taken by two of his colleagues in Wu Chun Hin v. Rinaldi, No. 402-66 (D. N. J., 1966), and Lam Ying Kwan v. Rinaldi, No. 483-66 (D. N. J., 1966).

We agree with the decision of Judge Coolahan and the position advanced by the Fifth, Eighth and Second Circuits. We do not believe that Congress by enacting §106 (a) or the Supreme Court by construing that section liberally intended that all administrative decisions affecting the deportation of an alien should be reviewable directly and exclusively in the court of appeals. If the Supreme Court had intended that interpretation, it could have so stated in the *Foti* case; but it did not.[3]

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[2] The Ninth Circuit cases appear to be conflicting. *Compare* Fong v. INS, 308 F.2d 191 (C.A. 9, 1962), *with* Holz v. INS, 309 F.2d 452 (C.A. 9, 1962).

[3] The Court noted the conflict among the circuits but did not cite any case with approval. 375 U. S. at 220 & n. 3.

What the court did in the *Foti* case was to place primary reliance on the function of the special inquiry officer to determine both the question of deportation and the availability of discretionary relief. The Court specifically noted those denials of discretionary relief which would be reviewable in the courts of appeals; and, in a footnote, the Court made, what is for us, the most telling distinction between what is reviewable here and what is not:

> "When §106(a) was enacted, the withholding of deportation under §243(h) was *a matter determined by an official other than the special inquiry officer* conducting the deportation hearing * * *. Under revised and currently effective regulations, * * * the decision on any §243(h) request for relief which the alien might wish to make [is] * * * effected in the deportation proceedings and reflected in the final order of deportation. While *presumably denials of §243(h) relief were not covered by §106(a) at the time of its enactment,* it does not seem incongruous to assume that such orders, because of the change in administrative regulations making such decisions *an integral part of the deportation proceedings conducted by a special inquiry officer,* are now within the reach of §106(a)'s judicial review provisions." 375 U. S. at 230 & n. 16 (Emphasis supplied).

Gleaned from the above, the sole determinants of review are whether the administrative decision was made by the special inquiry officer and was an integral part of the deportation proceedings conducted by him. The result in *Giova* is completely consistent with our analysis of *Foti* since motions to reopen are addressed to the special in-

quiry officer, 8 C. F. R. §§242.22, 103.5, and are part of the deportation proceedings.[4] It is therefore clear that we have no jurisdiction to review the district director's denial of petitioners' applications for stays.

Parenthetically, we note that to adopt the position urged upon us by the parties would provide a broader scope of judicial review of administrative determinations in immigration and naturalization matters than prevails in any other area of governmental administrative action. While it cannot be disputed that the purpose of §106(a) was to prevent dilatory tactics frequently employed by counsel for aliens to postpone the inevitable (deportation) as long as possible, we cannot believe that to achieve this end all administrative action affecting deportation, regardless of the official responsible for it, is reviewable exclusively by this court. To say that the denial of a stay by a district director must be reviewed by this court when the regulations, 8 C. F. R., §243.4, prohibit appeal within the Service itself, is absurd. Finally, we can only add our concurrence to the Second Circuit's conclusion that new legislation is necessary to rescue the courts and lawyers from these fruitless jurisdictional disputes. Tai Mui v. Esperdy, 371 F. 2d 778 & n. 3.

The petitions will be dismissed for lack of jurisdiction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[4] See Lee v. INS, 375 F.2d 723 (C.A. 9, 1967), where the court of appeals had jurisdiction to consider the merits of a case identical with the Chung case presently before us. There, the appeal arose out of a denial of a motion to reopen. See also Tai Mui v. Esperdy, 371 F.2d 772.

SUPREME COURT, U. S.
638
SEP 20 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

CHENG FAN KWOK,

Petitioner

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ABRAHAM LEBENKOFF and JULES E. COVEN,
Attorneys for Petitioner,
One East 42nd Street,
New York, N. Y. 10017.

LEBENKOFF & COVEN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CHENG FAN KWOK,

Petitioner

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit dismissing the petition to review an act of the Immigration and Naturalization Service.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1967. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Involved

1. Does the United States Court of Appeals have jurisdiction over this matter?

2. Does the United States Court of Appeals have exclusive jurisdiction over all immigration matters pursuant to Section 8 U. S. C. 1105(a)?

Statute Involved

Immigration and Nationality Act of 1952, as amended:

> "Sec. 106.(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, . . . ".

Statement

The petitioner is a native and citizen of China who entered the United States as a crewman on November 24, 1965. After his entry, he was afforded a hearing in deportation at which time he was granted the privilege of voluntary departure, but he did not depart within the allotted time. Thereafter, a notice was sent to him directing him to surrender for deportation on June 20, 1966.

Prior thereto, the petitioner filed an application with the Immigration Service asking that his deportation be stayed on the basis that he was a refugee and that he wished to remain in the United States until such time as his application for classification as a refugee, pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended, could be adjudicated. The respondent notified the petitioner that the application for a stay of deportation was denied since he could not adjust his status in the United States as he had not resided here for two years.

The petitioner then commenced an action pursuant to Section 8 U. S. C. 1105(a) in the United States Court of

Appeals for the Third Circuit, alleging that he was entitled to apply for classification as a refugee in the United States since the regulations promulgated by the Attorney General did not permit such applications to be made in Hong Kong, the country to which he was to be deported; in fact the application could only be made in seven countries in the world, all located in Europe and this regulation arbitrarily eliminated him from applying for conditional entry into the United States; and, for a determination stating that the denial of the Application for a Stay of Deportation was improper. The Court of Appeals for the Third Circuit dismissed the petition on the basis that it had no jurisdiction over the matter and that it properly belonged in the United States District Court.

Reasons for Granting the Writ

The decision below raised a substantial question of law as to the meaning of Section 8 U. S. C. 1105(a). The Court's opinion brings to the fore the difference in the interpretation of this difficult section of the law that exists in the different Circuits of the United States. There have been a number of cases dealing with jurisdiction that have been decided differently in different Circuits. The Second Circuit in a similar type of case, found jurisdiction was properly in the District Court. *Tai Mui* v. *Esperdy,* 371 F. 2d 772 (C. A. 2, 1966), cert. denied, — U. S. — (1967). The Seventh Circuit has, apparently, come to a different determination wherein it held that any administrative determination that involves the execution or suspension of the deportation order is ancillary to that order and is reviewable in the Court of Appeals. *Melone* v. *INS,* 355 F. 2d 533 (C. A. 7, 1966); *Skiftos* v. *INS,* 332 F. 2d 203 (C. A. 7, 1964). The Sixth Circuit also appears to have adopted that construction of the Act. *Televera* v. *Pederson,* 334 F. 2d 52 (C. A. 6, 1964). The Fifth and Eighth Cir-

cuits agree with the Second and Third Circuits. *Samala* v. *INS*, 336 F. 2d 7 (C. A. 5, 1964); *Mendez* v. *Major*, 340 F. 2d 128 (C. A. 8, 1965). Prior to the determination in this matter, different determinations were made in the District Court in New Jersey. (See p. 5 of Opinion.)

The problems that exist in this matter were very clearly stated in the Court's opinion. In addition to that, the problems of the jurisdiction of these matters were discussed thoroughly in the case of *Tai Mui*.

From all of the foregoing, it can readily be seen that the situation with reference to Section 8 U. S. C. 1105(a) is a muddy one and judges and lawyers can only look to the Supreme Court to clarify the law to have it interpreted uniformly throughout the United States. With the substantial conflict existing throughout the country with reference to the jurisdiction on immigration matters, it is imperative that the Supreme Court grant certiorari in this case so that the matter can be clarified.

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit.

Dated: New York, New York
September 15, 1967.

Respectfully submitted,

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Opinion of the Court

(Filed August 4, 1967)

By STALEY, *Chief Judge.*

These proceedings were commenced in this court to review decisions of the district director of the Immigration and Naturalization Service in Newark, New Jersey. The district director had denied petitioners' applications for stays of deportation pending disposition of their applications for adjustment of status pursuant to § 203(a)(7) of the Immigration and Nationality Act (hereinafter referred to as the "Act"), 8 U.S.C. § 1153(a)(7) (Supp. II, 1966).

The petitioner in No. 16027, Chan Kwan Chung, a citizen of China, entered the United States on March 29, 1964. As a crewman, he could remain in this country only as long as his vessel was in port but not in excess of 29 days. 8 U.S.C. § 1282(a). He remained longer than permitted, and deportation proceedings were commenced against him in July of 1964.[1] Chung apparently conceded his deportability but sought permission to depart voluntarily. His request was denied. No appeal was lodged with the Board of Immigration Appeals.

Chung was ordered to surrender for deportation to Hong Kong on July 7, 1966. On July 5, two days before he

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[1] The facts in the Kwok case, No. 16005, are similar: Cheng Fan Kwok, a citizen of China, entered the United States as a crewman on November 24, 1965. He was ordered deported on May 16, 1966, and was granted permission to depart voluntarily. He did not depart voluntarily and was ordered to surrender for deportation on June 20, 1966. On that date, he filed an application with the district director for a stay of deportation pending the submission of an application for adjustment of status under §203(a)(7). The application for a stay was denied.

was to be deported, he filed an application for a stay of deportation with the district director in Newark. The reason asserted for the stay was to permit him time to submit an application for adjustment of status pursuant to a recent amendment to the Immigration and Nationality Act, § 203(a)(7). The district director denied the application, stating that under the published regulations of the Service, 8 C.F.R. § 245.4, adjustment of status under § 203(a)(7) is governed by § 245 and that crewmen are excluded from adjusting their status under § 245.

Two issues are presented by these petitions for review. The first is whether this court has jurisdiction to entertain the petitions, and the second is whether crewmen are eligible to adjust their status under § 203(a)(7). We deal first with the question of jurisdiction since a decision on this point adverse to the petitioners would render unnecessary a consideration of the merits of each petition.

Both the petitioners and the Immigration and Naturalization Service urge that this court has exclusive jurisdiction to review the district director's decisions. Our earlier decisions to the contrary in Lam Man Chi v. Bauchard, 314 F.2d 664 (C.A.3, 1963), and Scalzo v. Hurney, 314 F.2d 675 (C.A.3, 1963), should not be accorded any weight in light of our reliance on and the subsequent reversal of the Second Circuit case of Foti v. INS, 308 F.2d 779 (1962), *rev'd*, 375 U.S. 217 (1963). The statute, § 106(a) of the Act, which confers jurisdiction on the courts of appeals to review orders of deportation and exclusion provides:

> "The procedure prescribed by, and all the provisions of sections 1031-1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation * * * made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of

> this title [§ 242(b) of the Act] or comparable provisions of any prior Act * * *." 8 U.S.C. § 1105a(a).

The question before the Supreme Court in the *Foti* case was whether a denial of discretionary relief under § 244(a)(5) of the Act (suspension of deportation) was a "final order of deportation" within the meaning of §106(a). Premising its conclusion on the legislative history of § 106(a) and its purpose, the Court held that the denial of § 244(a)(5) relief was reviewable in the court of appeals. The Court said that the purpose of § 106(a) was to "abbreviate the process of judicial review" by creating " 'a single separate, statutory form of judicial review of administrative orders for the deportation of * * * aliens.' " 375 U. S. at 224-25. The Court also noted that Congressmen knowledgable in immigration matters had stated in debate that a final order of deportation should include ancillary determinations such as applications for discretionary relief which were made in the same proceeding. Finally, the Court concluded that bifurcation of judicial review—review of the deportation order in the court of appeals and review of the denial of discretionary relief in the district court—was wholly inimical to the purpose of legislative history of the statute.

Though the Supreme Court in *Foti* placed considerable reliance on the fact that applications for discretionary relief are traditionally tried in one and the same proceeding with the rule to show cause why the alien should not be deported, it admitted that in a large percentage of cases deportability is conceded and that the only question before the special inquiry officer is whether the application for discretionary relief should be granted. The Court also mentioned the other types of applications for discretionary relief, in addition to those under § 244(a)(5), which would be reviewable in the courts of appeals:

> " * * * [I]t seems rather clear that all determinations made during and incident to the administrative

> proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to § 244(e) and orders denying the withholding of deportation under § 243(h), are likewise included within the ambit of exclusive jurisdiction of the Courts of Appeals under § 106(a)." 375 U.S. at 229.

The Court left open the question of whether the denial of a motion to reopen the deportation proceedings is reviewable by the court of appeals. It subsequently decided that question in the affirmative in a per curiam opinion. Giova v. Rosenberg, 379 U.S. 18 (1964), *reversing* 308 F.2d 347 (C.A.9, 1962).

Since *Foti* and *Giova,* there have been a number of decisions in the courts of appeals and the district courts dealing with the jurisdictional reach of § 106(a). The Seventh Circuit has adhered to its pre-*Foti* decisions of Blagiac v. Flagg, 304 F.2d 623 (C.A.7, 1962), and Roumeliotis v. INS, 304 F.2d 453 (C.A.7), *cert. denied,* 371 U.S. 921 (1962), which hold that any administrative determination that involves the execution or suspension of the deportation order is ancillary to that order and is reviewable in the court of appeals. Melone v. INS, 355 F.2d 533 (C.A.7, 1966); Skiftos v. INS, 332 F.2d 203 (C.A.7, 1964). The Sixth Circuit also appears to have adopted that construction of the Act. Talavera v. Pederson, 334 F.2d 52 (C.A.6, 1964). The Seventh Circuit's position has, however, been rejected by the Fifth, Eighth and Second Circuits. Samala v. INS, 336 F.2d 7 (C.A.5, 1964); Mendez v. Major, 340 F.2d 128 (C.A.8, 1965); Tai Mui v. Esperdy, 371 F.2d 772 (C.A.2, 1966), *cert. denied,* — U.S. — (1967).[2]

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[2] The Ninth Circuit cases appear to be conflicting. *Compare* Fong v. INS, 308 F.2d 191 (C.A. 9, 1962), *with* Holz v. INS, 309 F.2d 452 (C.A. 9, 1962).

Conflicting interpretations of § 106(a) in the lower courts is exemplified by the division within one district court in this circuit. Judge Coolahan of the district court in New Jersey has held in Cheng Ho Mui v. Rinaldi, 262 F. Supp. 258 (D.N.J. 1966), that jurisdiction to review a district director's denial of a stay of deportation is in the district court rather than in the court of appeals. In so holding, he rejected the position taken by two of his colleagues in Wu Chun Hin v. Rinaldi, No. 402-66 (D.N.J., 1966), and Lam Ying Kwan v. Rinaldi, No. 483-66 (D.N.J., 1966).

We agree with the decision of Judge Coolahan and the position advanced by the Fifth, Eighth and Second Circuits. We do not believe that Congress by enacting § 106 (a) or the Supreme Court by construing that section liberally intended that all administrative decisions affecting the deportation of an alien should be reviewable directly and exclusively in the court of appeals. If the Supreme Court had intended that interpretation, it could have so stated in the *Foti* case; but it did not.[3]

What the court did in the Foti case was to place primary reliance on the function of the special inquiry officer to determine both the question of deportation and the availability of discretionary relief. The Court specifically noted those denials of discretionary relief which would be reviewable in the courts of appeals; and, in a footnote, the Court made, what is for us, the most telling distinction between what is reviewable here and what is not:

> "When § 106(a) was enacted, the withholding of deportation under § 243(h) was *a matter determined*

[3] The Court noted the conflict among the circuits but did not cite any case with approval. 375 U. S. at 220 & n. 3.

> *by an official other than the special inquiry officer* conducting the deportation hearing * * *. Under revised and currently effective regulations, * * * the decision on any § 243(h) request for relief which the alien might wish to make [is] * * * effected in the deportation proceedings and reflected in the final order of deportation. While *presumably denials of § 243(h) relief were not covered by § 106(a) at the time of its enactment,* it does not seem incongruous to assume that such orders, because of the change in administrative regulations making such decisions *an integral part of the deportation proceedings conducted by a special inquiry officer,* are now within the reach of § 106(a)'s judicial review provisions." 375 U.S. at 230 & n. 16 (Emphasis supplied).

Gleaned from the above, the sole determinants of review are whether the administrative decision was made by the special inquiry officer and was an integral part of the deportation proceedings conducted by him. The result in *Giova* is completely consistent with our analysis of *Foti* since motions to reopen are addressed to the special inquiry officer, 8 C.F.R. §§ 242.22, 103.5, and are part of the deportation proceedings.[4] It is therefore clear that we have no jurisdiction to review the district director's denial of petitioners' applications for stays.

Parenthetically, we note that to adopt the position urged upon us by the parties would provide a broader scope of judicial review of administrative determinations in immigration and naturalization matters than prevails in any

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[4] See Lee v. INS, 375 F.2d 723 (C.A. 9, 1967), where the court of appeals had jurisdiction to consider the merits of a case identical with the Chung case presently before us. There, the appeal arose out of a denial of a motion to reopen. See also Tai Mui v. Esperdy, 371 F. 2d 772.

other area of governmental administrative action. While it cannot be disputed that the purpose of § 106(a) was to prevent dilatory tactics frequently employed by counsel for aliens to postpone the inevitable (deportation) as long as possible, we cannot believe that to achieve this end all administrative action affecting deportation, regardless of the official responsible for it, is reviewable exclusively by this court. To say that the denial of a stay by a district director must be reviewed by this court when the regulations, 8 C.F.R., §243.4, prohibit appeal within the Service itself, is absurd. Finally, we can only add our concurrence to the Second Circuit's conclusion that new legislation is necessary to rescue the courts and lawyers from these fruitless jurisdictional disputes. Tai Mui v. Esperdy, 371 F.2d 778 & n. 3.

The petitions will be dismissed for lack of jurisdiction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

SUPREME COURT, U. S.
MAR. 8 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 638

CHENG FAN KWOK (A 15 355 927),

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Jurisdiction

The Judgment of the Court of Appeals was entered on August 4, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1); the petition for a writ of certiorari having been filed on September 20, 1967 and the certiorari having been granted January 29, 1968.

Questions Involved

I. Does the United States Court of Appeals have initial jurisdiction to review an Order of the Immigration and Naturalization Service denying an administrative stay of deportation?

II. Is the initial jurisdiction of the Court of Appeals limited to reviews of Orders made as an integral part of the deportation proceedings?

Statute Involved

Immigration and Nationality Act of 1952, as amended:

> "Sec. 106.(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, . . . ".

Statement

The petitioner is a native and citizen of China who entered the United States as a crewman on November 24, 1965. He was afforded a hearing in deportation on the 3rd day of March, 1966, where he conceded deportability, but was granted the privilege of voluntary departure. An appeal was taken to the Board of Immigration Appeals which was dismissed by the Board of Immigration Appeals on April 5, 1966.* Thereafter, the petitioner was given until May 11, 1966 to depart voluntarily from the United States. When he did not depart, a notice was sent to the petitioner directing him to surrender on June 20, 1966 for deportation to Hong Kong. Prior thereto, the petitioner filed an application with the Immigration and Naturalization Service asking that his deportation be stayed on the basis that he was a refugee from the Mainland of China and that he wished to remain in the United States until such time as his application for classification as a refugee, pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended, could be adjudicated. The petitioner alleged in his application that since there was no office in Hong Kong where he could make such an application, that the District Director in Newark, New Jersey rule on his application for classification as a refugee.

The respondent notified the petitioner, in writing (App. 6a) that his application for a stay of deportation was denied since he could not adjust his status in the United States as he had not resided here for two years. This decision was further elaborated on by the Government in

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* The appeal to the Board of Immigration Appeals was an appeal from a collateral issue which did not effect the deportability and was not raised in the petition to review.

their supplemental brief filed in the Circuit Court of Appeals indicating that they were denying the stay on the basis that the District Director did not have the authority to rule on the petitioner's application for classification as a refugee in the United States.

The petitioner then commenced this action pursuant to Section 8 U. S. C. 1105(a), Section 106(a) of the Immigration and Nationality Act of 1952, as amended, in the United States Court of Appeals for the Third Circuit, alleging that he was entitled to apply for classification as a refugee in the United States since the regulations promulgated by the Attorney General did not establish an office to apply for such relief in Hong Kong, the country to which he was to be deported. In fact, the application could only be made in seven countries in the world, all located in Europe, and this regulation arbitrarily eliminated him from applying for conditional entry into the United States; and, for a determination stating that the denial of the application for a Stay of Deportation was improper.

In this petition for review filed in the Third Circuit, the Order of the Board of Immigration Appeals of April 5, 1966 was not attacked by the petitioner. The sole complaint of the petitioner was that the denial of the application for a stay of deportation was improper and that the regulations barring him were also improper.

On August 4, 1967 the Court of Appeals for the Third Circuit dismissed the petition on the grounds that it had no initial jurisdiction over the matter and that the review of a denial of a stay of deportation properly belonged in the United States District Court. Thereafter, a petition for a writ of certiorari was filed in the United States Supreme Court and the petition for the writ was granted on January 29, 1968.

ARGUMENT

Point I

The denial of a stay of deportation is a "final order of deportation". The issue at the bar is one in which the sole question involved is what the intention of Congress was when they enacted Section 106(a) in September of 1961. Did they mean that only a final order of deportation made by the Special Inquiry Officer, which is subject to review by the Board of Immigration Appeals, is the only final order that is reviewable by the Court of Appeals, or, did they mean that the final administrative order of deportation is an order that can also be reviewed in the Court of Appeals? It is the petitioner's position that the effective final administrative order of deportation is the one reviewable initially in the Court of Appeals.

The petitioner herein is not seeking a review of the order of the Special Inquiry Officer or of the Board of Immigration Appeals; he is seeking a review of a decision by a District Director of the Immigration Service denying petitioner a stay of deportation. If the alien's application for a stay of deportation had been granted, the alien's deportation would not be effected. Since it was denied, this was a final order as, otherwise, he would have been physically expelled if not for this action.

This argument has been sustained by the Seventh Circuit. In *Blagaic* v. *Flagg*, 304 F. 2d 623, petitioner sought review of a decision of the Regional Commissioner denying his application for a stay of deportation pursuant to Section 243(h). The Court of Appeals retained jurisdiction and said:

"The language of Section 1105(a) is clear and unambiguous. Jurisdiction now lies initially in the courts of appeals to review 'final orders of deportation' made pursuant to 8 U. S. C. A., Sec. 1252(b). We think, however, that the review provisions of Section 1105(a) should not be given the narrow interpretation that the Government contends for.

While it is true that the only question is whether the Attorney General has abused his discretion in refusing to withhold deportation under the provisions of Section 1253(h), this question involves the execution or suspension of the deportation order, and therefore it is ancillary to the order. If the withholding of deportation is not granted, petitioner will be deported; thus, in a realistic sense the denial of a stay is a part of the deportation order." *Id.* at 625.

This situation, of course, would not occur today since the administrative regulations with reference to 243(h) hearings have now been changed by administrative regulation and since the decision on this application is now made by a Special Inquiry Officer, which is reviewable by the Board of Immigration Appeals. There is no question that now an application, pursuant to Section 243(h) would be reviewable in the Court of Appeals. In the case of *Roumeliotis v. Immigration and Naturalization Service,* 304 F. 2d 453 (7th Cir. 1962), cert. denied, 371 U. S. 921, the Court of Appeals took jurisdiction over denial of a first preference visa application since it relates to the status of an alien and is ancillary to the deportation order issued against the petitioner.

In the case at the bar the situation is the same as the case decided by the Seventh Circuit. Petitioner is seeking

a stay of the execution of the deportation order. That it does not involve Section 243(h) is of no moment. If there had been no deportation order, no application for stay would have been made. The application for a stay of deportation is inherently related to the deportation proceeding and must be considered ancillary to it.

In *Foti* v. *Immigration and Naturalization Service*, 375 U. S. 217, this Court held that the refusal of the Attorney General to grant suspension of deportation was reviewable in the Court of Appeals under Section 106(a). This Court broadly construed the legislative history of the statute as evidencing the plain objective of the Congress to eliminate piecemeal judicial review. At page 223 of this decision, the court stated as follows: "Representative Lindsay suggested that the legislative history should make absolutely clear 'that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final'. Representative Walter agreed and stated that 'the final order means the final administrative order.'" In the case at the bar, the application to the District Director would be the last administrative remedy left to the alien, to wit, an application for a stay of deportation after deportability has been determined by the Special Inquiry Officer and when no relief is available to the alien at a 242(b) proceeding. This interpretation, although a broad one, is not injurious to anyone. Later, in the Foti decision, this court stated "review of the denial of discretionary relief is ancillary to the deportability issue, and both determinations should therefore be made by the same court at the same time. We realize that deportability is conceded in a large number of cases. But this fact hardly detracts from our view as to a proper interpretation of Section 106(a)".

This court further extended the jurisdiction of the Court of Appeals to include review of orders refusing to reopen deportation proceedings, an application made after the hearing. See *Giova* v. *Rosenberg*, 379 U. S. 18 (1964). (It should be noted, however, that the motion to reopen involving Giova had been considered and denied by the Board of Immigration Appeals incident to it's review of the deportation order and not by a District Director's order.)

There are other courts that have come to a different conclusion than the Court of Appeals for the Third Circuit, to wit, *Melone* v. *INS*, 355 F. 2d 533 (C. A. 7, 1966); *Skiftos* v. *INS*, 332 F. 2d 203 (C. A. 7, 1964); *Televera* v. *Pederson*, 334 F. 2d 52 (C. A. 6, 1964).

It was the announced intention of the Congress in 1961 to amend and limit the right of judicial review of deportation orders of aliens in the United States. The stated purpose of Section 106, "is to create a single, separate, statutory review of administrative orders for the deportation and exclusion of aliens in the United States". H. R. Report #1086, 87th Congress, 1st Session, page 22. A determination by this Court that the Court of Appeals had initial jurisdiction of this matter would correspond with the declared purpose of Congress.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that the judgment of the Court of Appeals should be reversed and that the cause should be remanded to that Court with directions to entertain the petition for review.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 638

CHENG FAN KWOK, PETITIONER

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (A. 19a–25a) is reported at 381 F. 2d 542.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1967 (A. 18a). The petition for a writ of certiorari was filed on September 20, 1967, and was granted on January 29, 1968.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1]Petitions for certiorari were filed in Nos. 637 and 638, this Term. The two cases involved similar questions and both were included in the decision of the court below here at issue. On December 11, 1967, this Court granted certiorari in No. 637, but took no action on No. 638. The petition in No. 638 was granted after the Court was informed that No. 637 might become moot upon the impending departure from the United States of the petitioner in that case.

QUESTION PRESENTED

Whether Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)), vesting in the courts of appeals exclusive jurisdiction to review all "final orders of deportation," applies to an administrative order refusing a stay of deportation.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth in Appendix A, *infra*, pp. 45–54.

STATEMENT

Petitioner is a 47-year-old native and citizen of China who arrived at San Pedro, California, as a crewman on a vessel on November 24, 1965. He was permitted to enter the United States while his vessel was in port, but in no event for more than 29 days.[2] However, he deserted his vessel and remained in the United States unlawfully until he was apprehended in Newark, New Jersey, early the following year (A. 14a).

In the ensuing deportation proceedings petitioner conceded deportability. On March 3, 1966, the special inquiry officer granted him the privilege of voluntary departure, specifying that if petitioner failed to depart within the allotted time he was to be deported to Hong Kong, the place he had designated and where his wife and four children resided, and alternatively to the Republic of China on Taiwan, if Hong Kong would not accept him.[3] Petitioner appealed to the

[2] See Section 252, Immigration and Nationality Act (8 U.S.C. 1282).

[3] See Section 243(a), Immigration and Nationality Act (8 U.S.C. 1253(a)).

Board of Immigration Appeals, contending that the special inquiry officer lacked power to designate the place of deportation. The Board rejected this contention and dismissed the appeal on April 5, 1966 (A. 15a).

Upon petitioner's failure to depart voluntarily, he was directed to surrender for deportation on June 20, 1966 (A. 16a). On that date he filed an application for a stay of deportation, asserting that he was entitled to a determination of his classification as a refugee pursuant to Section 203(a)(7) of the Act (8 U.S.C. (Supp. II) 1153(a)(7)), that he did not believe he could make such an application in Hong Kong, and that he would depart from the United States as soon as his classification was determined (A. 8a).[4] The district director denied his application for a stay of deportation on the ground that he was not eligible for the relief he sought (A. 6a).[5]

Although the companion *Chung* case (No. 637, this Term) may now have become moot, it was considered, along with the instant case, in the opinion below. A brief summary of the facts of that case may assist in providing a comprehensive view of the question here presented and its significance for the disposition of

[4] Petitioner in the instant case, unlike the petitioner in No. 637, lacked the two years of residence required to make application for adjustment of status in this country under Section 203(a)(7).

[5] See *Mui* v. *Esperdy*, 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017, where denials of relief to aliens in similar situations were upheld; see also *Lee* v. *Immigration & Naturalization Service*, 375 F. 2d 723 (C.A. 9), certiorari denied, 389 U.S. 856.

other pending cases.[6] In *Chung* the petitioner also entered the United States as an alien crewman, and the duration of his stay was similarly limited. He remained longer than permitted, and deportation proceedings were commenced against him. He apparently conceded his deportability but sought permission to depart voluntarily, which request was denied. Ordered to surrender for deportation to Hong Kong, Chung filed an application for a stay of deportation with the district director to allow him time to submit an application for adjustment of status pursuant to the recently amended Section 203(a)(7). The district director denied the application on the ground that adjustment of status under Section 203(a)(7) is governed by Section 245 (8 U.S.C. 1255) and that crewmen are specifically excluded from adjusting their status under the latter provision (see A. 20a).

Both petitioners filed petitions for review in the Third Circuit. The government joined petitioners in asserting that the court of appeals had jurisdiction under Section 106(a) since the stays of deportation sought from the district director would affect the execution of the final orders of deportation which had been entered against them. That court, however, concluded that review in a court of appeals under Section 106(a) lies only where the order sought to be reviewed was made by a special inquiry officer as an

[6] By stipulations and court orders in the Third Circuit, approximately 119 pending cases are governed by the disposition of the *Chung* (No. 637) and *Kwok* (No. 638) cases. Of these, 45 are controlled by *Chung*, 69 by *Kwok*, and five by both cases.

integral part of deportation proceedings subsequently appealed to the Board of Immigration Appeals (A. 23a–24a). Noting a conflict among circuits on this question, the court below placed primary reliance on its reading of this Court's decision in *Foti* v. *Immigration & Naturalization Service,* 375 U.S. 217, and stated its disbelief "that Congress by enacting § 106(a) or the Supreme Court by construing that section liberally intended that all administrative decisions affecting the deportation of an alien should be reviewable directly and exclusively in the court of appeals" (A. 23a). Accordingly, the court below dismissed the petitions for review without consideration of the merits. Adhering to the position taken in the court of appeals on the jurisdictional issue and noting the existing conflict among the circuits, the government joined petitioners in urging the Court to grant certiorari to resolve this question.

SUMMARY OF ARGUMENT

I

The legislative history of the exclusive review procedure prescribed by Section 106(a) of the Immigration and Nationality Act demonstrates the dominant congressional purpose "to abbreviate the process of judicial review of deportation orders in order to frustrate * * * dilatory tactics in the courts." (*Foti* v. *Immigration & Naturalization Service,* 375 U.S. 217, 224). This was accomplished primarily by eliminating challenges to such orders in the district courts and by requiring that attacks on administrative determinations be presented directly to the courts of appeals.

As pointed out in *Foti* (*id.* at 225), "The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court."

II

The court below has misread this Court's decisions in *Foti* and in *Giova* v. *Rosenberg*, 379 U.S. 18, and its resulting conclusion impairs achievement of the statutory objectives. While the *Foti* opinion focused on determinations made by a special inquiry officer in a proceeding before him, that was because the Court was there dealing with a contention that some of the elements of his decision were reviewable separately in district courts. *Foti* expressly reserved the question of the reviewability under Section 106(a) of orders refusing to reopen deportation proceedings (375 U.S. at 231), and that question was resolved in favor of court of appeals' review in *Giova*.

The supposition that Section 106(a) relates only to proceedings conducted by special inquiry officers is unsupported by the statute and contrary to its purpose of expediting judicial review. It ignores the Attorney General's ultimate responsibility for administration of the immigration laws and for the delegation of his authority to various officials. It also obscures the crucial consideration—the relationship of the administrative determination to the basic order.

Congress cited as prime examples of abuse instances where repeated judicial review of administrative denials of relief had been sought after entry of the basic order. The court of appeals would not deny judicial review in such cases but would channel it initially to district courts. The result would be that separate portions of a deportation proceeding would be reviewed in different courts. Moreover, in attempting to distinguish between motions to reopen and motions for stays of deportation, the court has produced an anomalous situation—the form in which relief is sought, instead of the substance, determines the applicability of Section 106(a).

III

While Section 106(a) is not free from ambiguity, the statutory text admits of the interpretation we urge. The phrase "final orders of deportation" has already been construed broadly by this Court in *Foti* and *Giova*. The statutory designation of orders made "pursuant to administrative proceedings under section 242(b)" apparently stemmed from the desire to make clear that Section 106(a) had no application to *exclusion* proceedings. Moreover, determinations relating to the execution of the deportation order, including rulings on motions to stay deportation, can be regarded as having been made "pursuant" to proceedings under Section 242(b). Indeed, a deportation order might well be regarded as lacking elements of finality when its execution might be directly affected by subsequent applications for relief which are pending adminis-

tratively. This approach is explicitly confirmed by the most direct evidence of congressional purpose, the House Judiciary Committee's reference chart of "Deportation Case Procedures" which specifically lists "Stay of Deportation" and "Deportation" (*i.e.*, measures to execute the order) as segments of the deportation proceeding.

IV

Those courts of appeals which have adopted a restrictive interpretation of Section 106(a) have mistakenly placed principal reliance on the premise that such a view is required by the language of the statute and by this Court's decisions in *Foti* and *Giova*. The suggestion of the court below that new legislation is needed to avoid "fruitless jurisdictional disputes" is beside the mark since no such legislation will be required if the statute is construed in the manner we urge. Underlying the Second Circuit's view is a belief that the acceptance of jurisdiction would overburden the courts of appeals. The same fear was voiced by that court in *Foti*, but was found unpersuasive by this Court (375 U.S. at 230). No excessive burden of review developed in the Second Circuit after *Foti;* nor has such ensued in the Seventh Circuit and the other courts of appeals which construe the scope of Section 106(a) broadly. Similarly, the Ninth Circuit's suggestion that the statutory objective could be accomplished by revision of the administrative regulations so that special inquiry officers would make all reviewable determinations in a single proceeding ignores the

practical considerations which preclude such an approach. Thus, the inevitable result of a restrictive interpretation of the statute is to channel litigation challenging determinations made subsequent to the basic deportation order into the district courts, contrary to the aim of Section 106(a).

ARGUMENT

Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a) was enacted in 1961 and prescribes an exclusive procedure for judicial review of final deportation orders in courts of appeals. Questions involving the scope of that section have been considered by this Court on two prior occasions. In *Foti* v. *Immigration & Naturalization Service,* 375 U.S. 217, this Court unanimously adopted a broad reading of Section 106(a), and found that its language, considered in light of the basic congressional purpose, embraced discretionary determinations made during deportation proceedings. *Giova* v. *Rosenberg,* 379 U.S. 18, decided the following year by a unanimous court in a brief *per curiam* opinion, extended the liberal reading of the statute to include denials of motions to reopen deportation proceedings, an issue reserved in *Foti.*

Here, the question is whether the exclusive statutory procedure for judicial review also includes review in courts of appeals of denials of motions to stay deportation. On this issue, and on similar issues dealing with review of other ancillary and discretionary determinations which relate to or affect deportation orders, the lower courts are divided. This divergence

has resulted in "fruitless jurisdictional disputes" (*Mui* v. *Esperdy*, 371 F. 2d 772, 778 (C.A. 2), certiorari denied, 386 U.S. 1017) which have impaired effective administration of the laws relating to deportation. We urge a generous reading of the statute and believe that the restrictive interpretation adopted by the court below would defeat the congressional objective of minimizing dilatory and obstructive litigation which impedes the execution of deportation orders.

I. THE EXPLICIT CONGRESSIONAL PURPOSE IN ENACTING SECTION 106(a) WAS TO EXPEDITE THE EXECUTION OF DEPORTATION ORDERS BY PROVIDING FOR EXCLUSIVE REVIEW IN A COURT OF APPEALS

Concededly, the decisive language of Section 106(a) is somewhat unclear. Taking cognizance of the ambiguity, this Court observed in *Foti* (375 U.S. at 224):

> In arriving at the intended construction of this language, we must therefore inevitably turn to the purpose of Congress in enacting this legislation. The fundamental purpose behind § 106(a) was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.

Since the legislative history of Section 106(a) was extensively discussed in *Foti* (see 375 U.S. at 223–226), we limit ourselves here to a brief review of some of the salient aspects of that background. Proposals for the enactment of a statute providing for fair yet expeditious review of deportation orders originated

as early as 1952. See *Whom Shall We Welcome?*, Report of the President's Commission on Immigration and Naturalization, p. 169 (1953). In the ensuing years President Eisenhower twice recommended enactment of such a measure, and his recommendations were repeatedly supported by the Department of Justice (see H. Rep. No. 565, 87th Cong., 1st Sess., pp. 2–7). Earlier drafts provided for review in the district courts, with safeguards against repetitive and dilatory litigation (see H.R. 9182 and S. 3169, 84th Cong., 2d Sess.). However, the measure assumed its final form in bills introduced by Representative Walter in 1958 which prescribed the formula of exclusive review in the courts of appeals that was ultimately adopted. After conducting hearings the House Judiciary Committee reported a bill favorably, and it was passed by the House of Representatives in three succeeding Congresses, during the last of which the Senate joined with the House, and the bill, now in omnibus form, became law on September 26, 1961, as P.L. 87–301, 75 Stat. 650.

Thus, the measure was under continuous consideration in Congress for a period of nine years before its enactment. At every stage of this consideration the sponsors emphasized their desire "to abbreviate the process of judicial review of deportation orders in order to frustrate * * * dilatory tactics in the courts" (*Foti*, 375 U.S. at 224).

In the first exposition of his bill in the House Hearings, Representative Walter stated that the purpose of the legislation was to end "protracted litigation" challenging deportation orders and to set up "a single,

expeditious, and fair method of review" for that purpose.[7] The House Judiciary Committee, in its report on the 1961 omnibus bill which eventually became law, likewise noted its concern with "flagrant abuse of judicial review" by "protracted litigations," examples of which had been described in earlier committee reports, and stated that the objective of the judicial review provision was "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States" (H. Rep. No. 1086, 87th Cong., 1st Sess., pp. 22, 23). Similar expressions, in virtually identical language, appear in each earlier report of the House Judiciary Committee (H. Rep. No. 2478, 85th Cong., 2d Sess., p. 2; H. Rep. No. 423, 86th Cong., 1st Sess., p. 1; H. Rep. No. 565, 87th Cong., 1st Sess., p. 1).[8]

More specifically, the colloquy during the 1959 House debates between Representatives Walter, Lindsay and Moore (105 Cong. Rec. 12728), relied upon by the Court in *Foti* (375 U.S. at 223–224), is highly significant. This discussion, involving three legislators knowledgable in immigration matters, portrays a clear

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[7] *Judicial Review of Deportation and Exclusion Orders*, Hearing before Subcommittee No. 1 of the House Judiciary Committee on H.R. 13311, 85th Cong., 2d Sess., p. 22.

[8] To like effect, see 104 Cong. Rec. 17172–17173, for the remarks of Representative Walter, author of the bill and spokesman of the House Judiciary Committee, when the legislation was first considered in 1958; 105 Cong. Rec. 12728, where Congressman Walter agreed with Congressman Lindsay "that if there is any remedy on the administrative level left of any nature, * * * the deportation order will not be considered final" (*ibid.*).

intent that determinations directly affecting deportation orders, although made after the primary deportation proceeding, would be subject to the exclusive review procedure prescribed by Section 106(a). As Representative Walter stated, the term "final order of deportation," as used in the statute, "means the final administrative order" (105 Cong. Rec. 12728).

What emerges with clarity from a survey of the legislative history is the constantly articulated design of Congress to provide a single method or form of judicial review in courts of appeals. As described by Representative Walter (104 Cong. Rec. 17173), the review procedure prescribed, "by eliminating review in the district courts, * * * would obviate one of the primary causes of delay in the final determination of *all questions which may arise in a deportation proceeding*" (emphasis added). This crucial aspect of the legislation was aptly described by this Court in *Foti* (375 U.S. at 225):

> The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court.

II. ACCEPTANCE OF THE VIEW ADOPTED BY THE COURT OF APPEALS WOULD IMPAIR THE CONGRESSIONAL PURPOSE IN ENACTING SECTION 106(a).

Despite the legislative history which shows that Congress's design in enacting Section 106(a) was to end the bifurcation of judicial review of deportation

matters, the court of appeals here concluded that the reach of that provision did not extend to review of administrative denials of stays of deportation. In so ruling, the court below, relying extensively on a footnote in this Court's *Foti* opinion (375 U.S. at 230, n. 16; see A. 24a), found that *Foti* restricted Section 106(a) review to determinations initially made by special inquiry officers. This Court's later holding in *Giova* v. *Rosenberg,* 379 U.S. 18, that orders denying motions to reopen are reviewable in courts of appeals, was distinguished by the court below on the ground that such motions are addressed to the special inquiry officer and are part of the deportation proceedings (A. 24a–25a). In our view, the court of appeals' analysis of *Foti* and *Giova* is erroneous, and its reliance on these decisions is misplaced.

It is true that the *Foti* opinion emphasized the function of the special inquiry officer to decide all questions in the proceeding before him. But that was so, we submit, only because the Court in *Foti* was dealing with a contention that some of the elements of the special inquiry officer's decision were not within the ambit of Section 106(a). It is also true that in footnote 16 the Court said that under earlier procedure applications for withholding of deportation under Section 243(h) of the Act (8 U.S.C. 1253(h)) were dealt with separately and "presumably" were not covered by Section 106(a). But the Court was not actually confronted with the reviewability of such an application in *Foti,* and we do not regard that tentative footnote observation as intended to foreclose the

issue. Indeed, in *Foti* this Court reserved the question of the reviewability under Section 106(a) of orders refusing to reopen deportation proceedings, stating: "The question is admittedly a somewhat different one, since such an administrative determination *is not made during the same proceeding* where deportability is determined and discretionary relief is denied" (375 U.S. at 231) (emphasis added). That question was resolved in the subsequent *per curiam* decision in *Giova,* which clearly indicates, in our view, that Secton 106(a) is applicable to at least some determinations made subsequent to the entry of the primary order and not considered in the basic deportation proceedings.

By the same token, we dispute the court of appeals' suggestion that Section 106(a) has been definitively construed as applying only to decisions initially made by special inquiry officers. In *Foti* the emphasis on the role of the special inquiry officer was addressed to an attempt to bifurcate the review of portions of his decision. Likewise, in *Giova* the focus on the fact that decisions denying motions to reopen are made in proceedings initiated before special inquiry officers—either by such officers or by the Board of Immigration Appeals (see 8 C.F.R. 3.8, 103.5, 242.22)—finds its explanation in the limited issue then before the Court. Nothing in the Court's decisions in those cases was, in our view, intended to predetermine other and different questions regarding the scope of Section 106(a) that might arise in the future. Nor can the position taken by the government in *Foti* and *Giova* properly be viewed as having irrevocably conceded the inapplicability of

the review statute to situations such as are involved here.[9]

Nothing in the language of Section 106(a) requires that its coverage be confined to determinations made by special inquiry officers. Such a narrow view would not only be artificially literal but would ignore the statute's "fundamental purpose * * * to abbreviate the process of judicial review of deportation orders" (*Foti*, 375 U.S. at 224). No specific reference is made to special inquiry officers in Section 106(a). All authority under the immigration laws is vested in the Attorney General, who is authorized to delegate such authority (Section 103(a), Immigration and Nationality Act, 8 U.S.C. 1103(a)). The Attorney General has delegated his functions to various officers, and such allocations of responsibility have frequently been changed. 1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.), Sec. 1.7.

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[9] We recognize that the position here taken goes beyond that espoused in the government's brief in *Foti* (see Govt. Br., No. 28, 1963 Term, pp. 47–49) and, to a lesser extent, in *Giova* (see Govt. Br., No. 23, 1964 Term, pp. 16–17). Developments in the ensuing years, particularly the split in the circuits on the question of the applicability of the statute to review of ancillary determinations which directly affect execution of deportation orders, and the resulting jurisdictional disputes and bifurcation of review in some circuits, have led us to reconsider the position previously taken in this Court. We are confirmed in this course by the Court's liberal reading of the statute in *Foti* and its summary disposition of the issue involved in *Giova*, one which is closely related to the question here presented and which was preserved for later decision by the Court in *Foti*. We are now convinced, despite our earlier misgivings, that the language of the statute does admit of the reading we urge and that the congressional purpose cannot be achieved, as experience has shown, by a restrictive interpretation.

Section 106(a) does of course explicitly refer to "final orders of deportation * * * made * * * pursuant to administrative proceedings under section 242(b)" of the Act. And Section 242(b) of the Act (8 U.S.C. 1252(b)) recognizes the special inquiry officer's role in conducting deportation proceedings and in making determinations "as authorized by the Attorney General." But that section does not derogate from the Attorney General's control over, and his responsibility for, the entire deportation process. Thus, the Attorney General designates special inquiry officers and defines their duties (Section 101(b)(4), Immigration and Nationality Act, 8 U.S.C. 1101(b)(4)). He has assigned to district directors various other duties in the deportation process, and has established a Board of Immigration Appeals to hear appeals from certain decisions of special inquiry officers and of district directors. In addition, the Attorney General has provided for his own review, in some instances, of decisions of the Board of Immigration Appeals (see 8 C.F.R. 3.1, 103.1).

Moreover, the supposition that Section 106(a) deals only with administrative proceedings in which a special inquiry officer participates would make the application of the statute dependent on form rather than substance, and would countenance the type of bifurcated judicial review characterized by this Court in *Foti* as "inconvenient" and "clearly undesirable" (375 U.S. at 232). That view would foster the type of obstructive litigation that Section 106(a) was designed to eliminate. What the court below overlooked is that Congress, in enacting Section 106(a),

was vitally concerned with efforts to block deportation through dilatory tactics in seeking judicial review of applications made *after* the basic deportation order had been entered. As noted by this Court in *Foti* (375 U.S. at 226), the case histories of abuse recited in the various committee reports often included instances of litigation arising out of discretionary determinations. And among the most glaring examples of abuse were cases involving repetitious judicial review of discretionary relief sought after the basic order (see H. Rep. No. 565, 87th Cong., 1st Sess., pp. 7–11, 20–23).

Obviously, the ruling of the court of appeals does not purport to foreclose any judicial review of such subsequent determinations. It holds merely that the procedure for exclusive review in courts of appeals prescribed by Section 106(a) is inapplicable here. The converse, of course, is that such subsequent determinations can be challenged in district courts, in a suit brought under the Declaratory Judgment and Administrative Procedure Acts. *E.g., Mui* v. *Esperdy*, 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017. Were this the approach required, we would then be back to a situation almost as confusing and overlapping as that which gave rise to Section 106(a). One set of determinations affecting deportation orders would be reviewable in the courts of appeals; another set of determinations would be reviewable in the district courts. Both types of review could proceed consecutively or simultaneously. Appeals could of course be taken from district courts to courts of appeals, and would probably be taken in those cases where the principal objective was forestalling execution of de-

portation orders. Thus, many cases would reach courts of appeals in any event, whether pursuant to Section 106(a) or otherwise.

Here the merits of the controversy were briefed and argued in the court of appeals. All that will be accomplished by its refusal to exercise jurisdiction is to promote further delay in disposing of the cases of the 119 deserting Chinese crewmen here involved (see note 6, *supra*). If the Third Circuit's decision is upheld, these cases will have to be heard by a district court, and then most or perhaps all of them will be back before the court of appeals on appeal from the district court's decision. This was the time-consuming route followed by 384 deserting Chinese crewmen whose cases were governed by *Mui* v. *Esperdy, supra.* Moreover, the additional district court consideration required under the court of appeals' decision is pointless in the light of the manifest lack of merit here. The contention that the benefits of Section 203(a)(7) of the Act (8 U.S.C. (Supp. II) 1153(a)(7)), can be sought by recently deserting Chinese crewmen in the United States has already been considered and rejected by the Second Circuit in *Mui* v. *Esperdy, supra,* and by the Ninth Circuit in *Lee* v. *Immigration & Naturalization Service,* 375 F. 2d 723 (C.A. 9), certiorari denied, 389 U.S. 856.[10]

[10] Faced with such an insubstantial suit, the court below could well have followed the example of the Second Circuit in *Cheung* v. *Esperdy,* 377 F. 2d 819. In a similar situation involving review of denials of applications for stays of deportation, the court commented on the obviously dilatory na-

Accordingly, the approach adopted below would undermine the principal objectives sought to be attained by the enactment of Section 106(a). *First,* by requiring initial district court review of certain discretionary, administrative determinations affecting deportation orders, it would depart from the "key feature of the congressional plan" which was "the elimination of the previous initial step in obtaining judicial review—a suit in a District Court * * *" (*Foti,* 375 U.S. at 225). *Second,* it would invite the type of fragmented, piecemeal litigation this Court has characterized as "not only inconvenient [but] * * * clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language" (*id.* at 232). *Third,* since a declaratory judgment suit against the Attorney General could be brought in the District of Columbia, it would again encourage concentration in that district court of litigation challenging deportation orders, notwithstanding Congress's effort to avoid that result by the venue provisions in Section 106(a)(2) of the Act (8 U.S.C.

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ture of the litigation, and while doubting its jurisdiction, ruled against petitioners on the merits. In addition, reference should be made to the oddly different course of procedure followed in the *Lee* case. The ultimate relief sought in *Lee* was identical with that sought in the instant case. Yet Lee's counsel requested relief through a motion to reopen, which was found, in light of *Giova*, to confer jurisdiction on the court of appeals and to warrant expedited consideration. Counsel in the instant case designated his application as one for a stay of deportation, and this was found to result in an absence of jurisdiction in the court of appeals to review directly and to require the added step of initial district court consideration. Such an irrational distinction merely encourages forum-shopping for dilatory purposes.

1105a(a)(2)) (see H. Rep. No. 565, 87th Cong., 1st Sess., pp. 3, 13–16; H. Rep. No. 1086, 87th Cong., 1st Sess., pp. 28–29).[11] *Finally,* by precluding petitions for review under Section 106(a) relating to ancillary orders such as those denying a stay of deportation, it would in numerous instances make unavailing the explicit safeguards against repetitious litigation provided for in Section 106(c) of the Act (8 U.S.C. 1105a(c)) (see the discussion *infra,* p. 40). Those safeguards relate only to petitions for review or for habeas corpus, and apparently could not be invoked to defeat declaratory judgment suits challenging such determinations (see App. A, *infra,* pp. 48–49).

In short, we submit that the lower court's construction would lead to bifurcated, repetitious and dilatory litigation and would substantially impair the efficacy of the statute in meeting the problems it was designed to remedy. Indeed, the developing litigation has already shown this consequence in operation.

III. THE CONSTRUCTION HERE URGED IS CONSISTENT WITH THE LANGUAGE OF THE STATUTE AND WOULD FULFILL ITS PURPOSE

While the language of Section 106(a) is regrettably unclear, it is plain that the statute should be read, so far as its text permits, in a way which would effectuate its goal of minimizing dilatory, obstructive and repetitious attacks on deportation orders. That objective can best be achieved by requiring that judicial review of all administrative determinations

[11] See, *e.g.*, *De Lucia* v. *Attorney General*, No. 21,030 (C.A. D.C.), discussed in note 15, *infra.*

which are ancillary to and directly affect a basic deportation order—by seeking to vacate, suspend or delay the execution of such an order—be conducted exclusively in courts of appeals. Such a construction, we submit, is amply supported by the statutory language when considered, as this Court did in *Foti* (see 375 U.S. at 224), against the background of the congressional purpose.

The chief impediment found by some courts of appeals in arriving at such a construction is the statutory reference to "final orders of deportations" entered "pursuant to administrative proceedings under section 242(b) of this Act * * *." In *Foti* this Court rejected a restrictive interpretation of the first of the quoted phrases—one which would have limited the review procedure prescribed strictly to determinations of deportability. No consideration was given to the effect of the second phrase, except to note the relationship between the two (see 375 U.S. at 228), but that phrase has generally been cited by the courts favoring a restrictive interpretation of the scope of Section 106(a).

No definitive explanation of the intended meaning of the phrase appears in the legislative history. Early versions of the judicial review bill merely referred to "orders of deportation" (*e.g.*, H.R. 9182 and S. 3169, 84th Cong., 2d Sess.) The quoted language was added by Representative Walter, together with the reference to "final" orders, in his 1958 bill (H.R. 12487, 85th Cong., 2d Sess.). As previously noted (*supra*, p. 11), this measure set the pattern from which Sec-

tion 106(a) ultimately emerged, without substantial change.

It seems clear that in proposing this new language Representative Walter did not envisage its having any limiting impact. On the contrary, as the leading spokesman on behalf of the judicial review bill, he vigorously and repeatedly denounced repetitious and dilatory tactics obstructing the execution of deportation orders and urged a comprehensive statute to cope with these abuses. In the absence of a particularized explanation, we suggest that the reason the language in question was added was to make certain that the proposed review procedure would not be applicable to *exclusion* proceedings barring aliens seeking entry into the United States, as distinguished from *deportation* proceedings relating to aliens already in the country.[12] Representative Walter frequently emphasized his desire to limit review in exclusion cases to habeas corpus. His bill, and the law as finally enacted, included explicit provisions to assure this result (Section 106(b) of the Act, 8 U.S.C. 1105a(b)). In adding the quoted language regarding proceedings under Section 242(b), we suggest, Representative Walter's aim was to avert any possible interpretation which would make

[12] Interestingly, the Act uses the identical term "deported" in regard to the exclusion of aliens seeking entry and the expulsion of aliens already in the United States (compare Sections 236 and 237 (8 U.S.C. 1226, 1227) with Sections 241 and 242 (8 U.S.C. 1251, 1252). For the distinction between exclusion and deportation proceedings, see *Ma* v. *Barber*, 357 U.S. 185, and *Chew* v. *Colding*, 344 U.S. 590; see also *Chin* v. *Immigration & Naturalization Service*, No. 1160, this Term, where it is contended, erroneously in our view, that Section 106(a) review is available to an alien subject to an exclusion order.

the new review procedure available to aliens seeking admittance to the United States.

Moreover, the statute speaks of orders made "pursuant" to proceedings under Section 242(b). This itself invites a more liberal construction than that adopted by court of appeals, since orders made "pursuant" to proceedings under Section 242(b), considered broadly, would include orders relating to the execution of the basic deportation order. This reading is in keeping with the Court's decision in *Giova,* where exclusive Section 106(a) review of the denial of a motion to reopen the proceedings, made after the basic deportation order, was upheld. Since the later determination related to the effective execution of the basic order, it was encompassed within the umbrella of the term "final order of deportation". No tenable basis appears to exist for differentiating the denial of a motion to stay deportation, which is often a concomitant of a motion to reopen proceedings. The contention that the two should be treated differently because under present procedures they are decided by different administrative officials misses the point that both determinations relate equally to and can similarly affect the execution of the deportation order. As we have explained (*supra,* pp. 16–17), specific reliance on the special inquiry officer's role, in view of the Attorney General's ultimate responsibility for the entire deportation process and the constantly changing assignments of administrative duties, is misplaced in

delineating the scope of Section 106(a).[13] Instead, we submit, the critical consideration is the relationship of the adminstrative determination of which review is sought to the basic deportation order, rather than the identity of the official who acted on the application.

What has led some courts of appeals, including the court below, into error is their focus on one segment of the deportation process and their consequent failure to view the process in its entirety. We turn, then, to an analysis of the various stages of the deportation process from initiation of the proceedings to execution of the expulsion order. That analysis, we submit, contradicts the hypothesis adopted by the court below.

The process leading to deportation can conveniently be divided into three parts. Involved first are determinations leading to the institution of proceedings, which might be termed "antecedent determinations." These would include, for example, denial of an application for an extension of temporary stay (see 8 C.F.R. 214.1) or rescission of an adjustment of status previously granted (see 8 C.F.R. Part 246). Although the question is not presented here, such antecedent determinations might be viewed as merging with, and thus reviewable in courts of appeals as part of, the final deportation order (compare *Yamada* v. *Immigra-*

[13] Amended regulations, effective March 15, 1968, give special inquiry officers authority to rule on applications for stays of deportation in connection with motions to reopen (8 C.F.R. 242.22, as amended by 33 Fed. Reg. 2380). The amended regulation would have no impact in the instant case, where the motion for a stay was not accompanied by a motion to reopen the proceedings.

tion & Naturalization Service, 384 F.2d 214, 218 (C.A. 9); *Waziri* v. *Immigration & Naturalization Service,* C.A. 9, No. 21,129, decided January 18, 1968). Alternatively, when review of the basic deportation order is sought, such antecedent determinations might also be reviewable under the doctrine of "pendent jurisdiction", a matter which this Court found it unnecessary to reach in *Foti* (375 U.S. at 227, n. 14).

The second stage of the deportation process is the commencement of the deportation proceeding and its conduct through hearing and decision by the special inquiry officer and the Board of Immigration Appeals. Some, but not all, antecedent applications can be renewed during this stage (see 8 C.F.R. 242.17, 245.2(a), 249.2). It was settled in *Foti* that the review of all determinations made during this stage, which might be referred to as "integral determinations," are definitely within the ambit of Section 106(a)'s exclusive review procedure.

The third stage of the deportation process occurs after entry of the basic deportation order, and might be characterized as involving "subsequent determinations." These would include applications bearing directly on the deportation order or its execution, such as motions to reopen the proceedings or for a stay of deportation. The third stage might also include the resolution of other applications which would operate on the deportation order less directly, but might vitiate or mitigate its effect.

Considered against this background, the effort of the court below to distinguish this Court's holding in *Giova* cannot be supported. Motions to reopen the

proceedings and for stay of deportation pertain equally to the execution of the deportation order. As subsequent determinations which bear directly on the effectiveness of the deportation order, both seem clearly within the compass of the "final orders of deportation" of which Section 106(a) speaks. Indeed, the intent of Congress to include motions for stay of deportation within the coverage of Section 106(a) is unmistakably portrayed in a House chart (reproduced as Appendix B, *infra,* p. 55) entitled "Deportation Case Procedures."[14] In that chart, "Stay of Deportation" is specifically listed as part of the deportation process, as an adjunct of "Final Order of Deportation." In addition, the chart designates the execution of the deportation order, in a box captioned "Deportation," as the final step in the deportation process. In arriving at its decision, the court below apparently was not aware of this decisive expression of congressional purpose.

We submit, therefore, that this case is controlled by the holding in *Giova,* and reversal of the judgment below would seem warranted solely on the authority of that case. We urge, however, that the Court cast its decision here in broader terms, and thus resolve definitively those questions relating to the reach of Section 106(a) which have been raised since its decisions in *Foti* and *Giova.* Much of the difficulty has resulted from efforts to separate the determination of

[14] This chart was contained in several House Judiciary Committee reports supporting Representative Walter's bill (H. Rep. No. 423, 86th Cong., 1st Sess., p. 20; H. Rep. No. 565, 87th Cong., 1st Sess., p. 27), and was referred to and relied upon by this Court in *Foti* (see 375 U.S. at 226).

deportability from the execution of the deportation order. Acceptance of this dichotomy would irrationally require expedited review of the basic order while permitting dilatory review, initiated in a district court, of questions relating to its execution.[15] Consideration of the entire deportation process leads to the conclusion, we submit, that there is no sound justification for such different and divisive treatment.

In the last analysis, Section 106(a) cannot reasonably be read as excluding review of ancillary determinations relating to and directly affecting the execution of the basic deportation order. Such determinations are not infrequently the subject of litigation. *E.g.*, *Mensevich* v. *Tod*, 264 U.S. 134; *Fang* v. *Kennedy*, 317 F. 2d 180 (C.A.D.C.), certiorari denied, 375 U.S. 833; *United States* v. *Murff*, 264 F. 2d 926 (C.A. 2). Section 242(b) of the Act (8 U.S.C. 1252(b)) provides for the

[15] An example of this irrationality is *De Lucia* v. *Attorney General*, now pending in the United States Court of Appeals for the District of Columbia (No. 21,030, C.A.D.C.). After a deportation order was entered against him, DeLucia was unsuccessful in a judicial review proceeding challenging it. *De Lucia* v. *Flagg*, 297 F. 2d 58 (C.A. 7), certiorari denied, 369 U.S. 837. Thereafter, the administrative proceedings were reopened to permit him to apply for discretionary relief. His applications were denied and he then brought another review proceeding under Section 106(a) in the Seventh Circuit. Again he was unsuccessful. *De Lucia* v. *Immigration and Naturalization Service*, 370 F. 2d 305 (C.A. 7), certiorari denied, 386 U.S. 912. Immediately after this Court's denial of certiorari, he brought a proceeding for review in the United States District Court for the District of Columbia, challenging alleged irregularities in the execution of the deportation order. The district court dismissed without opinion, on jurisdictional grounds, and an appeal from that order is awaiting decision by the court of appeals.

procedure to be followed in determining deportability. Sections 243 (a) and (h) (8 U.S.C. 1253 (a) and (h)) prescribe the procedure to be utilized in accomplishing the "deportation of an alien in the United States provided for in this Act." Section 242(b) is just such a provision. Thus, in dealing with the execution of deportation orders, Sections 243 (a) and (h) and the implementing regulations (8 C.F.R. Part 243) should be viewed, we submit, as in *pari materia* with Section 242(b) and its implementing regulations (8 C.F.R. Part 242). Accordingly, determinations relating to the execution of deportation orders under Section 243(a) and its regulations should be regarded as having been made "pursuant" to proceedings under Section 242 (b), and are thus within the literal language and the obvious contemplation of Section 106(a). Moreover, Section 106(a) expressly provides for judicial review of "final" deportation orders. Ancillary proceedings involving what we have termed subsequent determinations frequently seek relief which, if granted, would render the basic order ineffective and, in any event, invariably delay the execution of such an order. In a real sense, then, a deportation order is not an absolutely final one so long as applications for such relief are pending administratively.

Acceptance of our suggested view that Section 106(a) embraces determinations directly relating to the execution of a deportation order would resolve most of the difficulties that have arisen over the past few years in applying the statute. There would remain two unresolved areas—judicial review of antecedent determinations and of subsequent determinations not

directly concerned with the execution of the deportation order but bearing on its continuing effectiveness. Neither of these situations is immediately presented here and the Court could dispose of this case without considering them. Since, however, the instant case provides an opportunity for detailed consideration and definitive resolution of the scope of Section 106(a), we submit, in summary fashion, our views regarding these aspects of the problem.

No difficulty appears to exist in finding antecedent determinations reviewable along with deportation orders under Section 106(a), whether articulated in terms of pendent jurisdiction, the concept of merger into the final order, or the theory that the validity of the deportation order necessarily depends on the propriety of these determinations (see *supra*, pp. 25–26). Such a conclusion would have the virtue of assembling all outstanding issues in a single judicial proceeding, and would thus avoid fragmented review.

Although the practical situation is somewhat different, we similarly support jurisdiction under Section 106(a) in regard to subsequent determinations which do not deal directly with a deportation order, but which would eventually result in its mitigation or extinction. Examples of such subsequent determinations are the denial of visa petitions seeking preferred status (see *Skiftos* v. *Immigration & Naturalization Service*, 332 F. 2d 203 (C.A. 7), and of applications for waiver of the foreign residence requirements for aliens who were admitted as exchange visitors (see *Talavera* v. *Pederson*, 334 F. 2d 52 (C.A. 6)). If the relief sought is granted, such subsequent determina-

tions would lead to the granting of permanent residence status and withdrawal of the deportation order. It is unavailing, in our view, to assert that subsequent determinations are not reviewable in courts of appeals because the basic determination is not contested. As this Court noted in *Foti*, deportability is seldom contested in the administrative proceedings (375 U.S. at 227). Indeed, deportability was conceded in both *Foti* and *Giova* and the sole issue before the reviewing courts was the availability of discretionary relief which would nullify the deportation order. We see no substantial difference when the application for discretionary relief is made after, rather than during, the basic proceedings. The critical consideration, in our view, is the application's relationship to the deportation order.

Accordingly, we submit that all subsequent determinations should be considered as ancillary to and part of a final deportation order for the purposes of judicial review under Section 106(a).[16] In any event, the denial of stays of deportation—the relief sought here—plainly relates directly to the execution of the deportation order and thus, whether or not Section 106(a) is construed as reaching *all* subsequent determinations, clearly comes within the reach of the statute.

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[16] Of course, the applicability of Section 106(a) to such ancillary determinations depends on the existence of a final order of deportation. When there has been no deportation proceeding or order, review under Section 106(a) would necessarily be inappropriate. *Martin* v. *Gardner*, 378 F. 2d 352 (C.A. 7); *Mendez* v. *Major*, 340 F. 2d 128 (C.A. 8); see note 12, *supra*.

IV. THE REASONS FOR REJECTING JURISDICTION ADVANCED BY THE COURT BELOW AND BY OTHER COURTS OF APPEALS ARE UNPERSUASIVE

There is a widespread conflict among the courts of appeals regarding the proper interpretation of Section 106(a) in the light of this Court's decisions in the *Foti* and *Giova* cases. Favoring the broad construction we have suggested are the Seventh,[17] Sixth [18] and Fourth [19] Circuits. The contrary and narrow reading is supported by the court below and the Second [20] and Ninth [21] Circuits, with the Fifth Circuit apparently tending in the same direction.[22] The expressions of view by the Eighth [23] and District of Columbia [24] Circuits are thus far inconclusive. It will be useful,

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[17] *Skiftos* v. *Immigration & Naturalization Service*, 332 F. 2d 203 (C.A. 7); *Melone* v. *Immigration & Naturalization Service*, 355 F. 2d 533 (C.A. 7); see also *Blagaic* v. *Flagg*, 304 F. 2d 623 (C.A. 7); *Roumeliotis* v. *Immigration & Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921.

[18] *Talavera* v. *Pederson*, 334 F. 2d 52 (C.A. 6); *Ferrante* v. *Immigration & Naturalization Service*, C.A. 6, Nos. 16,658, 17,854, decided February 7, 1968.

[19] *Rose* v. *Woolwine*, 344 F. 2d 993 (C.A. 4), where the court of appeals read Section 106(a) broadly to include review of administrative determinations which involve "the special consequences that will follow from the deportation" (*id.* at 995).

[20] *Mui* v. *Esperdy*, 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017; cf. *Cheung* v. *Esperdy*, 377 F. 2d 819 (C.A. 2).

[21] *Yamada* v. *Immigration & Naturalization Service*, 384 F. 2d 214 (C.A. 9); cf. *Waziri* v. *Immigration & Naturalization Service*, C.A. 9, No. 21,129, decided January 18, 1968.

[22] See *Samala* v. *Immigration & Naturalization Service*, 336 F. 2d 7 (C.A. 5), where, in a case decided prior to this Court's decision in *Giova*, the court found review under Section 106 precluded for failure to exhaust administrative remedies, and suggested that Section 106(a) review was unavailable for antecedent determinations but not for subsequent determinations.

we believe, to examine and respond to the reasons advanced by the courts which favor a restrictive interpretation.

A. *The Court Below.* Rejection of jurisdiction under Section 106(a) to review the denial of motions to stay deportation was predicated by the Third Circuit on its reading of this Court's decisions in *Foti* and *Giova*. Relying primarily on the "presumably" language in the *Foti* opinion (see *supra*, p. 14), the court below concluded that "the sole determinants of review are whether the administrative decision was made by the special inquiry officer and was an integral part of the deportation proceedings conducted by him" (A. 24a). It distinguished *Giova* on the ground that "motions to reopen are addressed to the special inquiry officer * * * and are part of the deportation proceedings" (A. 24a–25a). The latter assertion, it should be noted, is unsupported and indeed is contrary to this Court's statement in *Foti* that the issue of review of denials of motions to reopen "is admittedly a somewhat different one, since such an administrative determination is not made during the same proceeding where deportability is determined * * *" (375 U.S. at 231).

While conceding that the purpose of Section 106(a) was "to prevent dilatory tactics," the court below

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[23] Cf. *Mendez* v. *Major*, 340 F. 2d 128 (C.A. 8), where, however, there was no deportation proceeding or order.

[24] In *Attorney General* v. *Bufalino*, 371 F. 2d 738 (C.A. D.C.), Section 106(a) was found controlling where the review concerned an integral aspect of a reopened deportation proceeding; see also *De Lucia* v. *Attorney General*, No. 21,030 (C.A. D.C.), discussed in note 15, *supra*.

stated that it could not "believe that to achieve this end all administrative action affecting deportation, regardless of the official responsible for it, is reviewable exclusively by this court" (A. 25a).[25] The unexpressed, but implicit, basis for the lower court's assumption is that the courts of appeals should not be bothered with, and perhaps would be overburdened by, review of subsequent administrative determinations. While we explore this hypothesis at a later point (*infra*, pp. 36–37), it should be noted that the obvious result of adopting a restrictive approach to review under Section 106(a) is that such issues will be litigated in the district courts, with the added step of ensuing appeals to the courts of appeals where delay is the objective. In short, it is doubtful that the bother and burden will be significantly lessened by reading the statute narrowly.

In concluding its opinion, the court below noted that it concurred in the Second Circuit's view "that new legislation is necessary to rescue the courts and lawyers from these fruitless jurisdictional disputes" (A. 25a). We submit, however, that new legislation is not needed if we are correct in our interpretation of Section 106(a). Moreover, the nine-year period consumed in enacting the present statute, despite Representative Walter's vigorous sponsorship, indicates that new legislation may not come easily or promptly. Needless to add, there are no "fruitless jurisdictional

[25] Pursuing the same thought the court below thought it "absurd" to suppose that denials of stays of deportation could be reviewable in courts of appeals where there is no administrative appeal from such denials (A. 25a). But the reasons for disallowance of an administrative appeal from such determinations is precisely to discourage dilatory tactics (see 8 C.F.R. 243.4).

disputes" in the Seventh, Sixth, and Fourth Circuits, which have adopted a broad construction of Section 106(a).

B. *Second Circuit.* As in the *Foti* litigation (see 308 F. 2d 779), the Second Circuit has taken the lead in adopting a restrictive reading of the statute. In *Mui* v. *Esperdy,* 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017, an action challenging the denial of stays of deportation was brought in the district court by a group of deserting Chinese crewmen. The substantive issue was the same as that presented to the court below, and the district court dismissed the complaint on the merits. On appeal the court of appeals found that the district court had jurisdiction and affirmed the dismissal on the merits. In holding Section 106(a) inapplicable, it reasoned that that the orders denying stays of deportation "were not made pursuant to administrative proceedings under § 242(b)" (371 F. 2d at 776). Such a rigid assessment of the statute, as we have shown (*supra,* pp. 22–25), is not compelled by the text and runs counter to the manifest purpose depicted in the legislative history.

In addition, the Second Circuit found *Giova* inapplicable because in *Mui* no motion to reopen the proceedings was involved. Apparently, the Second Circuit would give controlling weight to the label placed on an application rather than focus on the role of the resulting administrative determination in the overall deportation process. Under the Second Circuit's view, by simply designating an application as one for a stay of deportation instead of for a reopening of the

proceedings, the deportee could avoid the jurisdictional requirements of Section 106(a).

While conceding that a broad interpretation would avoid a "sterile jurisdictional controversy," the Second Circuit did not feel itself justified in "recasting" the statute, or "in going so far beyond the words that Congress used * * * to give the courts of appeals exclusive jurisdiction over all orders made by immigration officers which might affect the deportation of aliens" (371 F. 2d at 777). Like the Third Circuit, it suggested "the desirability of Congress' clarifying this needlessly murky piece of legislation and rescuing lawyers and judges from the fruitless jurisdictional disputes that will continue to plague them until it does" (*id.* at 778, n. 3). We have already responded to the latter suggestion (see *supra,* p. 34). However, the Second Circuit's apparent objection to review in courts of appeals of "all orders * * * which might affect the deportation of aliens" merits further comment. In the first place, that view overlooks Representative Walter's declaration that Section 106(a) "would apply to any other issue brought up in deportation proceedings" (104 Cong. Rec. 12728), as well as the explicit listing in the House chart (see Appendix B) of "Stay of Deportation" as an integral part of the deportation process. Implicit in the Second Circuit's comment is an apparent apprehension that review of ancillary applications would overburden the courts of appeals. A similar concern was expressed by the Second Circuit in *Foti* (308 F. 2d 779, 788–

789), but was found unpersuasive by this Court (375 U.S. at 230). As noted earlier (*infra*, pp. 18–19), many cases will probably reach the courts of appeals in any event, after the delay resulting from initial consideration in the district courts. Moreover, the feared burden of numerous petitions for review has not developed in the Second Circuit after the *Foti* decision. And we are unaware of any excessive burden of petitions for review in the courts which might argue against the broad interpretation of the statute here urged. There has been some increase in such petitions for review in the Seventh Circuit,[26] but in the Sixth and Fourth Circuits the volume of such petitions has been quite insignificant. In short, the Second Circuit's concern with a predicted flood of Section 106(a) review petitions does not appear to be borne out by experience.

C. *Ninth Circuit.* We find the best statement in support of a restrictive reading of Section 106(a) in *Yamada* v. *Immigration & Naturalization Service*, 384 F. 2d 214 (C.A. 9). That case, however, is not precisely in point since it did not involve the denial of a stay of deportation but rather challenged the denial, subsequent to the entry of a deportation order, of a visa petition which would have enabled the deportee to apply for permanent resident status. In

[26] On February 29, 1968, 31 petitions for review under Section 106(a) were pending in the Seventh Circuit. In 23 of these the briefs of the parties had not yet been filed, six cases were ready for argument, and two were under advisement. The Seventh Circuit has been able to deal expeditiously with the petitions for review presented to it.

finding that it lacked jurisdiction, the court stated (384 F. 2d at 216):

> If we were satisfied that Congress intended the result reached by the Court of Appeals for the Seventh Circuit, we would agree that the language of section 106(a) does not necessarily bar it. The grant of jurisdiction to review final deportation orders made in section 242(b) proceedings could reasonably be taken to imply power to review other orders directly affecting the execution or suspension of the orders specifically mentioned.

However, the Ninth Circuit found, on the basis of observations in this Court's *Foti* opinion and the colloquy on the floor of the House of Representatives (see *supra*, pp. 12–13) that there was a deliberate congressional design to limit Section 106(a) review to determinations made in the course of the deportation proceedings. As we have previously indicated, we read the *Foti* opinion as addressed to the question before the Court and not as foreclosing the issue now under consideration (see *supra*, pp. 14–16). And the House colloquy, in our view, is not inconsistent with the position urged here, but supports a broad reading of the statute. Moreover, the overall legislative history does not, as we read it, support such a limited scope. Indeed, a more expansive design is plainly shown by the House chart describing the deportation process (see Appendix B), which indicates that stays of deportation and matters relating to the execution of the deportation order were regarded by Congress as within the purview of Section 106(a).

Further exploring the congressional purpose, the Ninth Circuit found that "Congress was also con-

cerned with the delay which resulted from multiple court proceedings" (384 F. 2d at 218). It stated "that Congress visualized a single administrative proceeding in which all questions relating to an alien's deportation would be raised and resolved, followed by a single * * * review both of the ultimate question of deportation and of all of the subsidiary questions upon which it might depend" (*ibid.*). Accordingly, it suggested that all difficulties could be resolved, through resort to the rulemaking process, by including all ancillary determinations in the deportation proceeding itself, and declared that this objective would not be achieved by a broad reading of Section 106(a), since that would still leave open the possibility of consecutive reviews (*ibid.*).

Despite its superficial plausibility and appeal, there are serious difficulties with the Ninth Circuit's proposed solution—amendment of administrative regulations in an effort to channel all determinations into one proceeding. Congress in enacting Section 106(a) was indeed concerned with multiple judicial review, but it nowhere stated that it was restricting each litigant to one proceeding. On the contrary, every significant legislative expression, including Section 106(a) itself and the committee report quoted by the Ninth Circuit, merely declared that the statute prescribed a single, exclusive "form" or "method" of review (see *supra*, p. 12). This Court pointed out in *Foti* that the "key feature" of the Congressional plan was to eliminate district court litigation (375 U.S. at 225).[27] And

[27] Moreover, in discussing the problem of dilatory litigation, Representative Celler, in opposing the bill, stated that "[t]here is nothing to prevent them from going to the court once or

Section 106(c), of the statute (8 U.S.C. 1105a(c)) itself recognizes that there will be multiple litigation in some cases; it bars a new petition for judicial review "unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order."

The Ninth Circuit's aim to foster a single review is certainly desirable. We join the court's suggestion (384 F. 2d at 218, n. 7), later implemented in *Waziri* v. *Immigration & Naturalization Service,* C.A. 9, No. 21,129, decided January 18, 1968, that antecedent determinations should be included in Section 106(a) review (see *supra,* p. 30). And we believe multiplicity of review can be reduced by regulations providing for consolidation of some ancillary determinations in the hearing process (see 8 C.F.R. 242.17, and *Foti,* 375 U.S. at 230, n. 16). But these are administrative expedients which promote expedited consideration, albeit they entail some awkwardness by requiring conditional applications for relief before deportability is determined. They do not change the total character of the deportation process which, as *Foti* and *Giova* indicate, is not limited to determinations of deportability.

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twice even now under this bill.'" Representative Walter did not dispute this statement, and merely observed that, "[i]n view of the fact that nobody is going to be deprived of judicial review under this bill, it seems to me that opposition to it comes from those people who would perpetuate the abuses that have manifested themselves throughout the years" (House Hearing, *supra* note 7, at 5).

As this Court recognized in *Foti* (375 U.S. at 222), the deportation process has been enlarged and complicated by the many discretionary remedies which have been provided since 1940. Indeed, many of the most important changes have been made since 1957 (see 1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.), Secs. 1.1, 1.4b, 1.4c. It has been feasible to provide for the consideration of some of these matters in the basic deportation proceeding. In other instances, it has been deemed more appropriate or expedient to consider them separately. It is difficult to conceive how their relationship to the basic deportation order is changed by the prescribed timing of their administrative consideration.

Moreover, as in the instant case, an application to reopen the proceedings or for stay of deportation frequently has been generated by benefits afforded by new legislation—here the major revision of 1965. As in many other cases, the motions to reopen or for stay of deportation were made here by deserting Chinese crewmen who claimed they were entitled to refugee benefits under Section 203(a)(7) of the Act (8 U.S.C. (Supp. II) 1153(a)(7)). Hundreds of deserting Chinese crewmen have sought similar relief. In many instances the statutory benefits they sought became available after the entry of the basic deportation orders, and thus could not in any event have been sought as an incident of the deportation proceedings themselves.

We believe the Ninth Circuit is mistaken in supposing that complete administrative consolidation is either required by the statute or can successfully be achieved. Practical considerations and the ordinary sequence of events prevent the consideration of all matters at the

same time by the same official. There are obstacles which inhere in the mechanics of the deportation process itself. Some determinations and procedures, as we have noted, necessarily occur after entry of the basic order. These include, of course, efforts to execute the order: It is necessary, for example, to communicate with foreign governments to ascertain whether they will accept the deportee and with transportation lines to arrange passage. It is also necessary to give the deportee time to arrange his affairs and to cope with emergent situations. These and similar matters usually can best be handled by district directors rather than special inquiry officers (see 8 C.F.R. 243.2, 243.3, 243.6, 243.7). That is why the regulations generally require that applications for stays of deportation be presented to the district directors who make the arrangements for executing the order (8 C.F.R. 243.4). Moreover, since special inquiry officers are not regularly stationed in many district offices, it is often more convenient and expeditious for applications to stay deportation to be presented to the district director.

Similarly, a later application may be presented because of changed circumstances, *e.g.*, the alien may be in a position to claim benefits because he marries an American citizen, has a child born in the United States or comes within the terms of a new law. Indeed, many of the questions regarding the applicability of Section 106(a) have resulted from subsequent determinations generated by such changed circumstances. The Ninth Circuit's hypothesis would not preclude new litigation when relief is denied in such situations

but would channel it into the district courts, a consequence Section 106(a) sought to avoid.

Multiple litigation does indeed present a continuing problem for which no completely satisfactory solution has yet been found. The problem is compounded, of course, by the automatic stay of deportation which is triggered by the filing of each petition for review, under Section 106(a)(3) of the statute (8 U.S.C. 1105a(a)(3)). Such stays have doubtless been utilized by those interested primarily in dilatory litigation. We urge, however, that the best way to deal with such litigation is the one projected by Section 106(a)—adherence to the single form of review in the court of appeals. The courts of appeals can, and do, cope with dilatory litigation—by enforcing the mandate of Section 106(c) prohibiting renewed review without a showing of changed circumstances, by granting motions to dissolve the statutory stay of deportation under Section 106(a)(3) and by expediting the consideration and disposition of meritless petitions for review.

By and large, the chief source of delay has been the "fruitless jurisdictional disputes" engendered by a restrictive interpretation of Section 106(a). That needless controversy will be terminated if this Court should approve the approach here urged—a broad reading of Section 106(a) adumbrated by the *Foti* and *Giova* decisions and already adopted by three circuits—and prevent any further, wasteful controversy over the forum in which review should be sought. It is the approach, we therefore submit, which this

Court, confirming the view of the Seventh, Sixth and Fourth Circuits, should here adopt.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the cause be remanded to that court with directions to entertain the petition for review.

Respectfully submitted.

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MARCH 1968.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

I. STATUTES

Sec. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.) [28] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall

[28] By Section 4(e) of the Act of Sept. 6, 1966, (P.L. 89-554, 80 Stat. 378, 621), the 1950 Act referred to (the Hobbs Act) was recodified as 28 U.S.C. 2341-2352.

be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e)

of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

(7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be con-

strued to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(8) it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy

provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

* * * * * *

Sec. 242. (b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceedings, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special

inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are de-

portable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States the expense of such removal may be paid from the appropriation for the enforcement of this Act.

* * * * *

Sec. 243. (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be

directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to ~~any~~ country which is willing to accept such alien into its territory.

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for

such period of time as he deems to be necessary for such reason.

II. REGULATIONS

Title 8 of the Code of Federal Regulations provides in pertinent part:

§ 242.8 *Special Inquiry Officers*—(a) *Authority.* In any proceeding conducted under this part the special inquiry officer shall have the authority to determine deportability and to make decisions, including orders of deportation as provided by section 242(b) of the Act; to reinstate orders of deportation as provided by section 242(f) of the Act; to determine applications under sections 244, 245, and 249 of the Act; to determine the country to which an alien's deportation will be directed in accordance with section 243(a) of the Act; to order temporary withholding of deportation pursuant to section 243(h) of the Act, and to take any other action consistent with applicable provisions of law and regulation as may be appropriate to the disposition of the case. A special inquiry officer shall have authority to certify his decision in any case to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact.[29] Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act.

* * * * *

§ 242.18(c) *Order of the specal inquiry officer.* The order of the special inquiry officer shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the special inquiry officer shall specify the country, or countries in the alternate, to which respondent's deportation

[29]As amended by 32 F.R. 9616 (July 4, 1967).

shall be directed. The special inquiry officer is authorized to issue orders in the alternative or in combination as he may deem necessary.

* * * * *

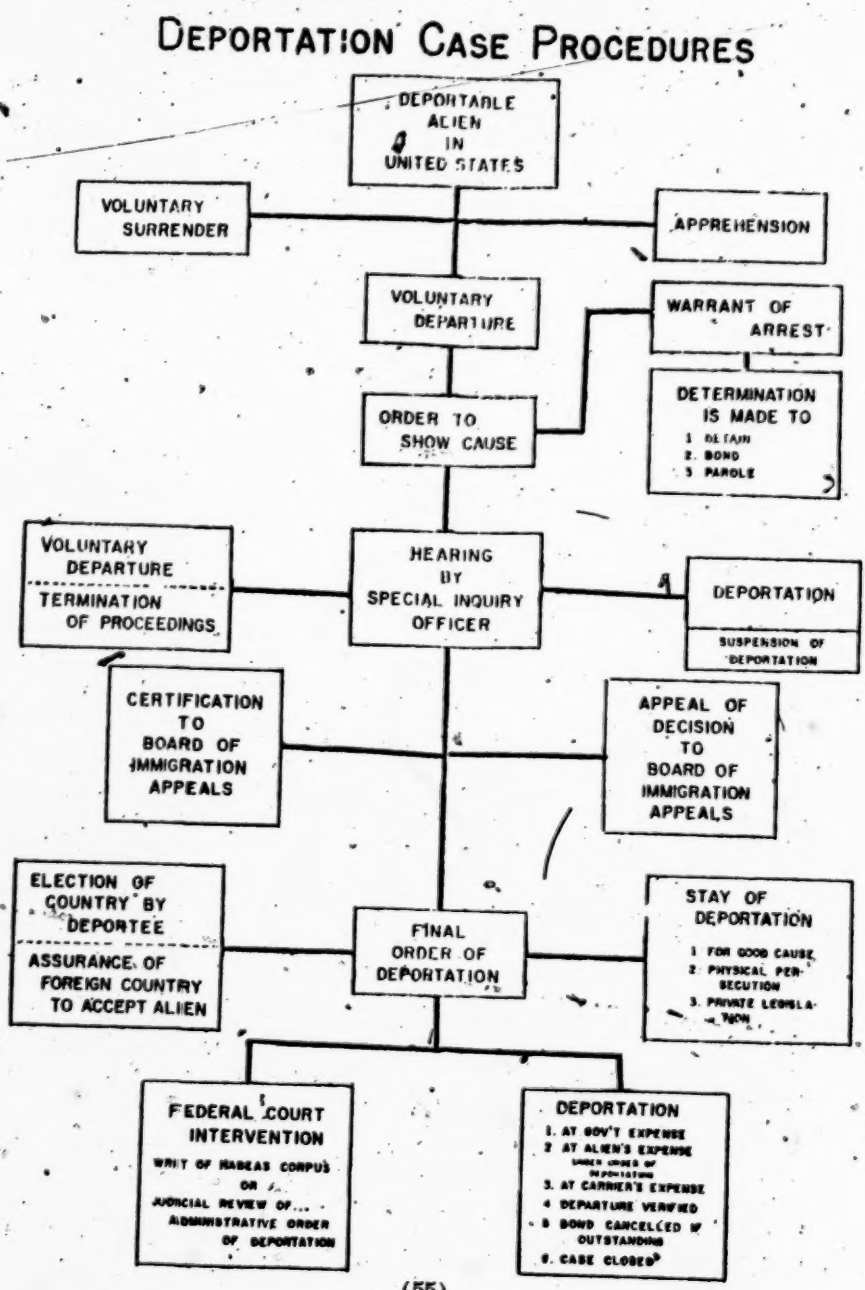
§ 243.2 *Warrant of deportation.* A warrant of deportation based upon the final administrative order of deportation in the alien's case shall be issued by a district director. The district director shall exercise the authority contained in section 243 of the Act to determine at whose expense the alien shall be deported and whether his mental or physical condition requires personal care and attendance en route to his destination.

* * * * *

§ 243.4 *Stay of deportation.* Any request by an alien under a final administrative order of deportation for a stay of deportation, except a request for withholding of deportation pursuant to section 243(h) of the Act, shall be filed on Form I–246 with the district director having jurisdiction over the place where the alien is at the time of filing. The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. Written notice of the disposition of the alien's request shall be served upon him, but neither the making of the request nor the failure to receive notice of the decision thereon shall relieve or excuse the alien from presenting himself for deportation at the time and place designated for his deportation. Denial by the district director of a request for a stay is not appealable but such denial shall not preclude the Board from granting a stay in connection with a motion to reopen or a motion to reconsider as provided in Part 3 of this chapter.

APPENDIX B

Chart outlining administrative procedures in deportation cases, as reproduced in H. Rep. No. 423, 86th Cong., 1st sess., p. 20, and H. Rep. No. 565, 87th Cong., 1st sess., p. 27:



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SUPREME COURT, U. S.

No. 638

APR 10 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

CHENG FAN KWOK, Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE

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TREATISES:

1 Barron & Holtzoff, Federal Practice and Procedure § 23.2. . . . 41
2 Cyclopedia of Federal Procedure § 2.417 41
3 Davis, *Administrative Law* (1958), § 23.03 21
Gordon & Rosenfield, *Immigration Law and Procedure* (1967)
§ 5.11 33
§ 8.9(a) 40
§ 8.14 29
§ 8.15 29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 638

CHENG FAN KWOK, Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE

INTEREST OF AMICUS CURIAE

In reply to the petition for *certiorari*, respondent joined petitioner in asking that this Court hear the case, stated that it agreed with petitioner on the merits, and suggested that in the circumstances the Court might wish to appoint an *amicus curiae* to present an argument in support of the judgment of the Court of Appeals. In its order granting *certiorari*, 390 U.S. 918, the Court invited this *amicus curiae* to perform that role.

QUESTION PRESENTED

Whether Section 106(a) of the Immigration and Nationality Act, vesting in the courts of appeals exclusive jurisdiction to review all "final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act," applies to an administrative denial of a stay of deportation that was not entered in a proceeding under Section 242(b).

STATEMENT

The statement of the case by respondent, the Immigration and Naturalization Service (hereinafter "INS"), is correct. Since in our argument we stress the differences between the procedure followed in a Section 242(b) deportation proceeding, 66 Stat. 208 (1952), 8 U.S.C. 1252(b), and the procedure followed by the INS in taking action outside such a proceeding, we add to respondent's statement the following:

Petitioner's request for a stay of deportation consisted of a one page form (A. 9a), to which was annexed a two page form (A. 10a-11a) in which he stated his grounds for seeking classification as a refugee under Section 203(a)(7), 8 U.S.C. (Supp. II) 1153(a)(7). So far as appears, these documents were not prepared by counsel, since there was no signature in the blocks reserved for "Person Preparing Form, If Other Than Applicant." The "order" denying the stay consisted of a brief letter from the Acting District Director to petitioner stating that petitioner was "ineligible to apply for adjustment of status in the United States" because he had "gained entry into the United States as a crewman" (A. 6a).[1] Nothing in the application disclosed that petitioner had gained entry in this fashion or, for that matter, that he

[1] Respondent believes that there was a "manifest lack of merit" in petitioner's application (Br. p. 19). Since the only issue here is whether the court of appeals or the district court should pass upon petitioner's claim, we do not discuss the merits of his application.

had been a crewman. But these three papers comprise the entire written record respecting the stay proceeding before the Acting District Director. Accordingly, the District Director's Office either secured and relied upon the file of the Section 242(b) deportation proceeding or obtained this extra-record information through oral conversations. If there were oral conversations between petitioner or a representative of his and the Office of the District Director, they were not recorded.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a 1961 statute that has generated a singular contrariety of opinion in the lower courts and that accordingly has already been twice considered by this Court. The statute, Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105(a), 75 Stat. 651 (1961), was designed to change the pattern of judicial review of deportation and exclusion cases in several respects. The focus of the litigation has been upon that provision in the statute, subsection (a), that requires direct appeal to the courts of appeals of "all final orders of deportation" that are "made . . . pursuant to administrative proceedings under section 242(b) of this Act." Previously, INS orders had been reviewable in the first instance only by the district courts under the general grant of jurisdiction of Section 279 of the Immigration and Nationality Act of 1952, 66 Stat. 230, 8 U.S.C. 1329.[2]

The prior decisions of this Court settled a pervasive controversy concerning the first of these statutory phrases—"final orders of deportation"—but the Court was not required to decide the meaning of the second—orders "made . . . pursuant to administrative proceedings under section 242(b) of this Act." In *Foti v. Immigration & Naturalization Service*,

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[2] "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title . . . ." See *Lam Man Chi v. Bouchard*, 314 F.2d 664, 666 n. 2 (3d Cir. 1963).

375 U.S. 217, this Court held that an order denying discretionary suspension of deportation, though not literally an "order of deportation," fell within that statutory phrase. But the decision by the INS respecting that type of discretionary relief had by regulation been made during the Section 242(b) deportation proceeding. Therefore, the decision in *Foti* does not control with respect to whether orders denying discretionary relief, but entered entirely outside a Section 242(b) deportation proceeding, can be considered to have been "made . . . pursuant to proceedings under section 242(b)." Nor did the Court's subsequent decision in *Giova v. Rosenberg*, 379 U.S. 18, settle the question, for that case involved a denial of a motion to reopen a Section 242(b) proceeding.

It is this issue—whether courts of appeals have jurisdiction under Section 106(a) to review directly INS orders that may affect a deportation order but that are taken outside a Section 242(b) proceeding—that is presented in this case. The denial of a stay to petitioner probably was sufficiently related to the deportation order so that, under *Foti*, it would have been directly appealable to the court of appeals under Section 106(a) if it had been entered in a Section 242(b) proceeding.[3] But it was not issued in such a proceeding. The lower court held that, in such circumstances, it was without jurisdiction because of the Section 106(a) limitation to orders made "pursuant to administrative proceedings under section 242(b)." The lower court's construction of

[3] It perhaps could be argued that the order here is distinguishable from the order in *Foti* because the relief sought by petitioner, if granted, would have required merely a change in the date of deportation. (Petitioner sought a stay only "pending a determination of [his] classification as a refugee" and stated that he would "depart from the United States as soon as . . . [his] classification is determined" (A. 9a).) Such an approach was suggested in *Tai Mui v. Esperdy*, 371 F.2d 772, 776-777 (2d Cir. 1966). However, it was not suggested by the lower court in the case at bar, and we do not urge it. If respondent's basic analysis of the statute were to be accepted by this Court, we believe that no distinction should be drawn among the various types of orders that have a substantial bearing upon the deportation order, but rather that all such orders should be subject to direct appeal.

the statute is squarely supported by the Second and Ninth Circuits and less clearly by the Fifth, while it is opposed by the Sixth and Seventh Circuits.[4] Petitioner and respondent urge this Court to adopt the view of the latter courts.

Respondent does not really dispute that the statutory language is a considerable obstacle to its position.[5] Respondent's contention that the obstacle can be overcome rests basically upon its view that it would be unreasonable to "make the application of the statute dependent on form rather than substance" (Br. p. 17), and that accordingly such a purpose should not be ascribed to the Congress. Rather, says respondent, the touchstone should be the Congressional determination to obviate delay and obstruction in deporting aliens, a policy that is impaired by the traditional method of initial review by a district court with appeal to a court of appeals, but that would be promoted if "the critical consideration [for court of appeals direct review] is the relationship of the administrative determination of which review is sought to the basic deportation order, rather than the identity of the official who acted on the application" (Br. p. 25).

While such a "substance over form" principle may have an appealing ring, as a guideline for solving the particular problem at hand it does not withstand careful examination for the following reasons:

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[4]The cases are identified and classified in respondent's brief at pp. 32-33. We disagree with respondent's reading of *Rose v. Woolwine*, 344 F.2d 993 (1965), on the basis of which respondent places the Fourth Circuit in opposition to the court below. Insofar as here relevant, that case involved a refusal by the special inquiry officer to reopen the Section 242(b) proceedings. Accordingly, in that respect under *Giova* the order was sufficiently related to the Section 242(b) proceeding to come within Section 106(a).

[5]Petitioner's position is identical to respondent's. Since respondent's discussion is more detailed, and for the sake of simplicity, we direct our response in terms to the arguments of respondent.

I

The language of the statute is plain. The restriction of direct review to orders made "pursuant to administrative proceedings under section 242(b)" cannot reasonably be read to permit direct review of orders entered wholly outside the context of a Section 242(b) deportation proceeding. Respondent's suggestion that this phrase was designed merely to insure that Section 106(a) review would not be available in *exclusion* cases, as opposed to deportation cases, is not tenable. The language is not apt for that purpose. Moreover, the Congress knew how to speak clearly to this subject. Section 106(b) unequivocally states that an alien involved in the exclusion proceeding "may obtain judicial review . . . by habeas corpus proceedings and not otherwise."

II

The opinion in *Foti v. Immigration & Naturalization Service, supra,* strongly supports the lower court's interpretation of Section 106(a). In *Foti*, this Court repeatedly stressed that the order in that case had been entered in a Section 242(b) proceeding; and in a lengthy footnote addressed to an argument advanced by the lower court, this Court observed that an order that had *not* been entered in a Section 242(b) proceeding "presumably" would not be appealable under Section 106(a). Nor is the force of the *Foti* opinion mitigated by the subsequent *per curiam* decision in *Giova v. Rosenberg, supra.* That decision stands only for the rule that a motion to reopen a Section 242(b) proceeding is sufficiently related to that proceeding to fall within Section 106(a), just as a denial of a motion for a new trial would be appealable together with the final judgment of a district court.

III

Apart from the *Foti* opinion, there is good reason to accord Section 106(a) its most obvious meaning. Other direct review statutes, including the Hobbs Act which Section 106(a) explicitly incorporates, apply generally, if not invariably, only to orders that are entered pursuant to quasi-judicial type administrative proceedings. Where there are such proceedings, there is an adequate basis upon which a court of appeals can act, including an adequate evidentiary record upon which to appraise material issues of disputed fact. The legislative history of some of these provisions indicates that this consideration was one of the reasons for permitting direct review by the courts of appeals. Moreover, because of the problems that may beset courts of appeals in attempting to review agency orders in the absence of trial-like administrative procedures, courts have construed direct review statutes as dependent upon such proceedings. *E.g.*, *United Gas Pipe Line Co. v. Federal Power Comm'n*, 181 F.2d 796 (D.C. Cir. 1950), *cert. den.*, 340 U.S. 827.

By analogy, Section 106(a) is reasonably restricted to orders entered in the context of a Section 242(b) proceeding, since only Section 242(b) guarantees the type of hearing—notice, the right to representation, the right to adduce evidence and to cross-examine—traditionally associated with a quasi-judicial proceeding. Without the sort of record such a hearing produces, the courts of appeals will in many situations be unable intelligently to determine whether the order under attack is sustainable.

Moreover, the relevant legislative history, while scant, tends to support this view of the scope of Section 106(a). In defending the provision against the charge that the INS proceedings would not produce a record adequate for court of appeals review, Representative Walter, the principal author and advocate of the bill, pointed to the procedural provisions of Section 242(b). In contrast, the legislative history cited by respondent is beside the point. The colloquy among Representatives Walter, Lindsay, and Moore, if anything,

supports our position; and the chart appended to the committee reports cited by respondent was simply a catalog of all possible steps in a deportation case without reference to the reach of Section 106(a).

IV

Affirmance of the lower court's judgment would not have unfortunate practical consequences. To the extent that judicial review would be prolonged, this is the price the statute exacts for the benefits of restricting direct review to its traditional role *i.e.*, review of orders arising out of quasi-judicial agency proceedings. In addition, the problem of delay is not as significant as in *Foti*, since most types of discretionary relief are now by regulation applied for during the Section 242(b) proceeding. If the INS thinks it necessary, it can complete the amendment process and place within the Section 242(b) context all issues of discretionary relief, such as applications for stays. Under *Foti*, all such determinations will then fall under Section 106(a). This would not only eliminate delay, but would obviate the possibility that appeals of INS actions will be bifurcated, with some issues going to the district court and others simultaneously to the court of appeals. Absent such amendment of the regulations, bifurcation may also be prevented by application of the doctrine of ancillary jurisdiction, so that if a Section 106(a) order is appealed to the court of appeals, that court would acquire jurisdiction of those issues which otherwise would have to be litigated in the district court. Finally, bifurcation may not in any event be particularly serious. The court of appeals could simply hold the Section 106(a) petition until the district court acts and then consolidate any appeal with the Section 106(a) petition.

On the other hand, certain practical considerations support the lower court's decision. A reduction of burden on the courts of appeals may be one, although the data available are not entirely persuasive. But it does seem clear that the lower court's rule, which focuses upon the consideration

whether an order is entered in a Section 242(b) proceeding, is a simpler test than respondent's, which turns upon the less objective consideration whether the order is sufficiently related to the deportation order. In view of the unfortunately extended history of litigation respecting Section 106(a), there is much to be said for the adoption of as simple a rule as possible.

Moreover, if direct appeal turns upon whether orders are entered in the context of a Section 242(b) proceeding, there may be an incentive for the INS to amend its regulations in the fashion described above so that as many discretionary determinations as possible are made during that proceeding. This consolidation of issues in the deportation proceeding in turn would reduce the opportunity for multiple ligitation, since all of the consolidated issues could be resolved in a single petition at the termination of the deportation proceeding. And multiple litigation was one of the concerns of the Congress when it enacted Section 106(a).

V

Respondent's contentions are advanced against the background of its belief that the Congress regarded Section 106 (a) as the primary 1961 provision for expediting litigation in deportation cases. Even if that is an accurate appraisal of the Congress' view, the considerations already discussed establish another, and controlling, purpose to restrict direct review to orders entered within the context of Section 242 (b) proceedings. But in point of fact respondent overemphasizes the significance of Section 106(a). The legislative history of the statute establishes that the Congress regarded the principal evil as the institution by aliens of successive lawsuits attacking various aspects of INS action, not the traditional exercise of the right to appeal from a determination of the district court. Accordingly, the Congress regarded as most important the Section 106 provisions respecting the applicability of *res judicata*, the 6 months statute of limitations, and the exhaustion of administrative remedies, not the direct review provision.

ARGUMENT

I.

THE LANGUAGE OF SECTION 106(a) STRONGLY SUPPORTS THE DECISION BELOW.

The denial of a stay to petitioner was not made in the Section 242(b) proceeding or even by the special inquiry officer who had conducted that proceeding. Rather, the Section 242(b) proceeding had ended and the stay was denied by an Acting District Director. Nor was the decision subject to review by the Board of Immigration Appeals (8 C.F.R. 243.4), as are determinations made by the special inquiry officer in a Section 242(b) proceeding (8 C.F.R. 242.21). The question is whether nonetheless it can be said that the denial of the stay was an order "made . . . pursuant to administrative proceedings under section 242(b)"—the decisive phrase in Section 106(a). The argument that it cannot, that an order "made . . . pursuant to administrative proceedings under Section 242(b)" must be made in the context of a Section 242(b) proceeding, is on such a primary level of interpretation that it is hardly subject to useful amplification beyond recitation of the statutory terms. At least, if there is a more sophisticated argument available, it has not occurred to us.

The burden of explanation, of pointing to an ambiguity in the statute, is respondent's. Before examining respondent's version of the statutory language, we note that respondent in this case reverses the position it took in *Foti* and *Giova*. There, respondent declared that Section 106(a) should be read precisely as it was in the case at bar by the lower court. Thus, in discussing the question whether there could be direct review of a type of order that, like the denial of a stay here, had been made by a District Director after the close of the Section 242(b) proceedings, respondent stated:

> Concededly, if these words [of the statute] are to be followed faithfully, it is difficult to see how the section can be construed to extend to a determina-

> tion made *subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation. [*Foti* Br. p. 48. See also *Giova* Br. pp. 16-17. (Italics in original.)]

This marks with absolute precision the position we take here. Respondent said in *Foti* that it had arrived at this view of the statute "with considerable reluctance, since the *spirit* of Section 106(a), particularly as illumined by its legislative history . . ., suggests that it may well have been the wish of Congress to remove all issues having any connection whatever with the deportation of aliens from the district courts and place them in the courts of appeals." The trouble, however, was that "if that indeed was what Congress intended, the language it employed was, in this particular respect, inadequate" (Br. pp. 47-48).

Respondent frankly acknowledges that its position in the case at bar represents a change of mind (Br. p. 16). Certainly both the Solicitor General and the INS are free to reconsider the view they expressed in *Foti*, but when they do so they invite comparison between the force of their prior and current analyses. The prior analysis, described above, was simple and direct. The current analysis is, we suggest, considerably less satisfactory.

Respondent proffers one alternative reading of the statutory language and one reason for ignoring it. First, respondent says that the term "pursuant" can be given a broader reading than the term "in," so that the phrase "orders . . . made . . . pursuant to administrative proceedings under section 242(b)" can be construed to "include orders relating to the execution of the basic deportation order" even though those orders are not made by a special inquiry officer in a Section 242(b) proceeding (Br. p. 24). This puts too heavy a load on "pursuant." If the Congress meant to say that there should be direct review of all orders "relating to the execution of the basic deportation order" even though, to

use respondent's language in its *Foti* brief, those collateral orders are made "*subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), [and] by an official *other than* the special inquiry officer who presided over the deportation proceedings," the Congress would hardly have expressed that intention by conferring jurisdiction only over orders made "pursuant to administrative proceedings under section 242 (b)."

Next, respondent suggests that "the reason the language in question was added was to make certain that the proposed review procedure would not be applicable to *exclusion* proceedings barring aliens seeking entry into the United States, as distinguished from *deportation* proceedings relating to aliens already in the country" (Br. 23). Conceivably if the legislative history clearly established that this was the only function the phrase was designed to perform, its apparent limitation of the scope of Section 106(a) to orders entered in the context of Section 242(b) proceedings could be disregarded. But there is no legislative history to that effect at all, only respondent's speculation. Moreover, that speculation has obvious weaknesses. First, it is hard to believe that the Congress as a whole, the subcommittee that worked with this legislation for years, and Representative Walter who was principally responsible for it and who certainly understood immigration law, could have been oblivious to the fact that the language appeared to restrict review to orders entered in Section 242(b) proceedings. If the aim were simply to insure that Section 106(a) review would not be available for exclusion orders, surely a less misleading way would have been found to express that intention. And the decisive consideration is that such a way *was* found. As respondent notes (Br. p. 23), Section 106(b) "included explicit provisions to assure this result"—namely, a declaration that an alien subject to an exclusion order "may obtain judicial review of such order by habeas corpus proceedings and not otherwise." Thus, by the unmistakable language of Section 106(b), the Congress eliminated exclusion orders

from Section 106(a) review, and it is in the highest degree implausible to suggest that the Congress tried to make doubly sure with the wholly inept—for that purpose—language of Section 106(a).

In short, not only does the "pursuant to administrative proceedings under section 242(b)" phrase carry the obvious meaning that orders entered outside the context of a Section 242(b) proceeding are not within the scope of Section 106 (a), but respondent has not suggested any reasonable alternative meaning.

II.

THE OPINION OF THIS COURT IN FOTI v. IMMIGRATION & NATURALIZATION SERVICE FORTIFIES THE LOWER COURT'S INTERPRETATION OF SECTION 106(a).

Although, as we have said, we do not contend that the holding in *Foti v. Immigration & Naturalization Service, supra,* is dispositive of the issue raised in the case at bar, the *Foti* opinion strongly supports the lower court's reading of Section 106(a).

The question in *Foti* was whether a denial of discretionary suspension of deportation under Section 244(a)(5), 8 U.S.C. 1254(a)(5), was directly appealable to the Court of Appeals under Section 106(a). The action had been taken by the special inquiry officer during the Section 242(b) deportation proceedings, so that the narrow question was whether the denial was a "final order of deportation" within the meaning of Section 106(a).

In holding that it was, this Court repeatedly stressed that the action was taken, and had traditionally been taken, as part of the Section 242(b) proceedings. Thus, after reviewing the course of prior administrative practice, the Court said that "the administrative discretion to grant a suspension of deportation has historically been consistently exercised as an integral part of the [deportation] proceedings," and that

"[i]t must be concluded that Congress knew of this familiar administrative practice and had it in mind when it enacted § 106(a)." 375 U.S., at 223. Again, the Court observed that "[i]f anything, the literal language [of Section 106(a)] would appear to include a denial of discretionary relief, made during the same proceedings in which deportability is determined, which effectively terminates the proceeding." *Id.*, at 224. And in relying upon the terms of Section 242(b) to establish a distinction between adjudications of deportability—the only issue the lower court had held appealable under Section 106(a)—and the statutory term "orders of deportation," the Court said that the fact that such a distinction was reflected in Section 242(b) was "of especial relevance since § 106(a), in describing the 'final orders of deportation' intended to be encompassed thereunder, specifically refers to administrative proceedings conducted under § 242(b)." *Id.*, at 228. If, as respondent asserts, the controlling consideration under Section 106(a) is the nature of the order, regardless of whether it is made in the context of a Section 242(b) proceeding, then the Court was underscoring the irrelevant in emphasizing that the *Foti* order had come out of such a proceeding.

But the "most telling distinction between what is reviewable [in the court of appeals] and what is not," as the lower court noted (A. 24a), appears in footnote 16 of the *Foti* opinion.[6] *Id.*, at 229-230. In this part of its opinion, the Court dealt with an argument advanced by the lower court in favor of a restricted reading of Section 106(a). The lower court had reasoned that to bring denials of suspension of deportation within the statute would produce the anomalous result that such orders would be directly appealable to the court of appeals whereas substantially similar orders—those denying the withholding of deportation under Section 243

[6] For a similar view of the relevance of footnote 16 to the issue here presented, see *Yamada v. Immigration & Naturalization Service*, 384 F.2d 214, 216 (9th Cir. 1967); *Cheng Ho Mui v. Rinaldi*, 262 F. Supp. 258, 262 (D.N.J. 1966).

(h), 8 U.S.C. 1253(h)—would be reviewed in the district court, since the latter type of order had not traditionally been entered in a Section 242(b) deportation proceeding. To the suggestion that this result would not obtain because, under recent amendments to the regulations, petitions for Section 243(h) relief also had to be made to the special inquiry officer in the Section 242 proceeding, the Court of Appeals replied that "it would be rather novel that an administrative regulation could bring something within the jurisdiction of the courts of appeals which was not covered by the language that Congress used and which, having given today, the Attorney General can take away tomorrow . . . ." 308 F.2d, at 785.

This Court, in rejecting the lower court's analysis, said not only that Section 243(h) orders made within Section 242(b) proceedings were reviewable under Section 106(a), but also, and most importantly, that orders of this sort made wholly outside Section 242(b) proceedings were *not* reviewable under Section 106(a). Thus, as to the first point the Court stated: "[I]t seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to § 244(e) and orders denying the withholding of deportation under § 243(h), are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a). We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review available in the Courts of Appeals." 375 U.S. at 229-230. As to the second point, and in amplification of its observation about the impact of administrative regulations, the Court in footnote 16 pointed out that, under the regulations in effect at the time of enactment of Section 106(a), the withholding of deportation under Section 243(h) was not determined in Section 242(b) deportation proceedings, and accordingly that "*presumably denials of § 243(h) relief were not covered by § 106(a) at [that] time . . .*" *Id.*, at 230.

Respondent does not dispute that, if determinations respecting withholding of deportation under Section 243(h) were not subject to review under Section 106(a) before those determinations were by regulation entrusted to the special inquiry officer conducting the Section 242(b) proceeding, neither are orders like the one in the case at bar. Moreover, respondent concedes that the Court in footnote 16 of the *Foti* opinion indicated the view that such orders are not appealable under Section 106(a) (Br. p. 14). Respondent says, however, that the Court's observation in footnote 16 was only "tentative" and does not "foreclose the issue" (*ibid.*). Moreover, respondent suggests that the Court's subsequent *per curiam* decision in *Giova v. Rosenberg, supra,* must be read as a retraction of that part of the *Foti* opinion (Br. pp. 14-15). Indeed, respondent claims that "This case is controlled by the holding in *Giova*, and reversal of the judgment below would seem warranted solely on the authority of that case" (Br. p. 27).

We do not quarrel with respondent's first point. The Court is of course not bound by its *dictum*. We urge simply that where, as in *Foti*, the *dictum* was a careful rejoinder to an argument set forth by the lower court in support of its judgment, it is entitled to considerable weight.

We do, however, find rather startling the notion that the holding in *Giova* requires reversal of the judgment below. It is not reasonable to interpret that *per curiam* opinion as an adoption by the Court of the rationale now advanced by respondent—namely, that all orders that bear a substantial relationship to the deportation order are subject to Section 106(a) review.

In the first place, that rationale, as we have indicated, is both inconsistent with the footnote 16 discussion in *Foti* and wholly different from the rationale elaborated by the

Court in *Foti*, which rested in substantial measure upon the fact that the order had been entered in a Section 242(b) proceeding. It is scarcely credible that the Court would so significantly have modified its views—particularly in the face of the problems posed by the statutory language—with a one sentence *per curiam*.

In the second place, as we have also pointed out, the rationale advanced by respondent in this case is newly devised and is inconsistent with the rationale respondent proposed to the Court in *Giova*. In *Giova*, respondent adhered to its view in *Foti* that it would be an "undue strain upon the statutory language to extend it to a 'determination made . . . *'subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation'" (Br. pp. 16-17). But respondent urged that this interpretation of the statute—which would preclude review under Section 106(a) of the order involved in the instant case—did not bar Section 106(a) review of the *Giova* order refusing to reopen the Section 242(b) deportation proceedings, because such an order "is made by the same officer who entered the final order of deportation . . . [or by the Board of Immigration Appeals that reviewed that order] and is directly linked with the original proceedings out of which the deportation order arose." Therefore, respondent concluded, "an order declining to reopen the [Section 242 (b)] proceedings is so intimately and immediately associated with the principal order (the final order of deportation) that it would be pointless to require that the subsidiary directive be treated otherwise than as an adjunct of the principal order—comparable to the denial of a motion for rehearing or reconsideration" (Br. p. 18).

That is a persuasive distinction between orders entered wholly outside a Section 242(b) proceeding, such as the order in the case at bar, and orders refusing to reopen the proceeding, such as the order in *Giova*. We suggest that it

is far more reasonable to conclude that this analysis urged upon the Court by respondent in *Giova* was the basis for its decision than to suppose that the basis was the quite different, and inconsistent, rationale advanced by respondent in this case.

That is the way the lower court viewed *Giova*: "The result in *Giova* is completely consistent with our analysis of *Foti* since motions to reopen are addressed to the special inquiry officer . . . and are part of the deportation proceedings" (A. 24a-25a). The lower court, we submit, was correct.[7]

III.

IT IS NOT UNREASONABLE TO LIMIT SECTION 106(a) APPEALS TO ORDERS MADE IN THE CONTEXT OF A SECTION 242 PROCEEDING, AND SUCH A READING IS SUPPORTED BY THE ONLY DIRECTLY RELEVANT LEGISLATIVE HISTORY.

Apart from *Foti*, there are other reasons the lower court properly followed the plain meaning of the language of Section 106(a). As we now show, the restriction imposed by that language is sensible. Moreover, to the extent there is relevant legislative history, it supports the lower court's reading of the provision.

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[7] *Giova* has been read the same way by other courts in cases involving facts identical to those in the case at bar. See *Tai Mui v. Esperdy*, 371 F.2d 772, 776-777 (2d Cir. 1966); *Cheng Ho Mui v. Rinaldi*, 262 F. Supp. 258, 263 (D.N.J. 1966).

A. Restriction of Section 106(a) Can Be Justified on the Same Basis as Similar Restrictions in Analogous Direct Review Statutes—the Desirability of Permitting Direct Appeals to Courts of Appeals only Where the Agency Has Conducted a Quasi-Judicial Type of Hearing.

A central ingredient of respondent's appraisal of Section 106(a) is the assumption that it makes no sense to prescribe different forms of judicial review for orders that are substantively indistinguishable. Thus, the argument goes, since the sort of order involved in *Foti*—denial of discretionary suspension of deportation sought on hardship grounds—is related in fundamentally the same way to a deportation order as is the sort of order involved in the case at bar, both should travel the same route through the courts and it is unreasonable to suppose that the Congress meant to provide otherwise.

But it is not unreasonable so to suppose. Respondent overlooks the significance of the procedural context in which agency determinations are made. The importance of that consideration is underscored by a comparison of Section 106(a) with analogous judicial review provisions.

1. *The character of other direct review provisions.* The pattern of trial in the district court followed by review in the court of appeals is, of course, the norm in the federal judicial system. Generally speaking, the exceptions fall into two categories: omission of the court of appeals in favor of direct review by this Court, and omission of the district court in favor of direct review by a court of appeals.[8] Direct

[8] For statutes providing for direct appeal to this Court, see, *e.g.*, 28 U.S.C. 1252, 1253; 42 Stat. 168 (1921), 7 U.S.C. 217; 32 Stat. 823 (1903), 15 U.S.C. 29; 18 U.S.C. 3731; 32 Stat. 823 (1903), 49 U.S.C. 45.

For statutes providing for direct appeal from administrative decisions to the courts of appeals, see notes 9, 10, and 11, *infra*.

Review by a three-judge district court, as in the case of review of Interstate Commerce Commission orders, falls for our purposes into

appeal to this Court, justified upon considerations such as the presumed importance of the type of questions involved, does not concern us here. The analogy to Section 106(a) is to be found in those provisions prescribing elimination of the district court stage, not merely because the various provisions are like Section 106(a), but even more obviously because Section 106(a) itself incorporates, with specified exceptions, the procedure of the Hobbs Act, 28 U.S.C. 2341-2352, one of the circuit court review statutes.[9]

Most of the direct review statutes relate to the independent regulatory commissions.[10] Elimination of the district court stage with respect to the orders of those commissions can be justified on the theory that the typical quasi-judicial type of hearing held by them eliminates the need for trial court fact-finding; that a reasonable guaranty of the integrity of the agency's resolution of factual and legal issues is provided by the independent status of its officers and its adherence to the traditional pleading, briefing, argument, and hearing procedures of a trial court; that it is accordingly

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both categories. There is rarely a "trial" in the three-judge court, which functions in almost every case in the same way as a court of appeals would. And the review is followed by direct appeal to this Court.

[9] The Hobbs Act was enacted in 1950, 64 Stat. 1129, 68 Stat. 961, and recodified as 28 U.S.C. 2341-2352 by Section 4(e) of the Act of September 6, 1966, P.L. 89-554, 80 Stat. 378, 621.

[10] The seminal provision was contained in the Federal Trade Commission Act, 38 Stat. 720 (1914), 15 U.S.C. 45(c). Other agencies affected by comparable provisions are the Securities and Exchange Commission, 48 Stat. 80 (1933), 15 U.S.C. 77i, 48 Stat. 901 (1934), 15 U.S.C. 78y, 49 Stat. 834 (1935), 15 U.S.C. 79x, 54 Stat. 844 (1940), 15 U.S.C. 80a-42, 54 Stat. 855 (1940), 15 U.S.C. 80b-13; the National Labor Relations Board, 49 Stat. 455 (1934), 29 U.S.C. 160 (f); the Federal Power Commission, 49 Stat. 860 (1935), 16 U.S.C. 825*l*, 52 Stat. 831 (1938), 15 U.S.C. 717r(b); the Civil Aeronautics Board, 72 Stat. 795 (1958), 49 U.S.C. 1486; the Federal Communications Commission, 48 Stat. 926 (1934), 47 U.S.C. 402, 28 U.S.C. 2341-2347; and the United States Maritime Commission, 52 Stat. 961 (1938), 46 U.S.C. 1181.

unnecessary to provide the right to more than one review; and that courts of appeals are the appropriate tribunals for that review both because an evidentiary hearing is unnecessary and because review of agency orders on the basis of the agency record resembles review of a district court judgment on the basis of the trial court record.

The several statutory provisions prescribing circuit court review of certain actions of agencies within the Executive Branch can be justified in the same way, except of course for the factor of independence of the decision-making officers from either the Executive or the Congress. In each case, so far as we have been able to discover, the agency orders subject to circuit court review are by statute required to be entered only after there has been an opportunity for a full hearing of the type associated with quasi-judicial proceedings.[11]

2. *Legislative history of the direct review statutes.* This view of the direct appeal statutes—that they are explicable largely, or importantly, in terms of the procedures employed by the agency in making the determinations subject to review—is not only a reasonable inference from the character of the statutes, but it has support in legislative history. The direct appeal statutes are modeled upon section 5 of the Federal Trade Commission Act,[12] which was fashioned by the conferees of the House and Senate after each house had passed bills vesting review in the district courts. While the

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[11] Regulation of toll bridge rates by the Secretary of the Army, 49 Stat. 671 (1935), 33 U.S.C. 504, 505; action by the Secretary of Agriculture under the Federal Seed Act, 53 Stat. 1287 (1939), 7 U.S.C. 1599, 1600; revocation by the "Commerce" Board of grants respecting foreign trade zones, 48 Stat. 1002 (1934), 19 U.S.C. 81r; regulation by the Postmaster General of discrimination respecting second-class mail by freight, 39 Stat. 424 (1916), 39 U.S.C. 6212; action by the Secretary of Agriculture under the Packers and Stockyards Act, 42 Stat. 161 (1921), 7 U.S.C. 193, 194, 210, 211, 28 U.S.C. 2341-2347; wage determinations by the Secretary of Labor under the Fair Labor Standards Act of 1938, 52 Stat. 1064, 29 U.S.C. 208, 210.

[12] 3 Davis, Administrative Law, § 23.03 at 302.

legislative history of this provision is sparse, it leaves no doubt that the court of appeals was chosen as the reviewing forum because the essential trial court functions—taking evidence at a hearing and preparing a record complete with findings of fact—were to be performed by the commission. The Conference Report states:

> In order to obtain a speedy settlement of disputed questions, it is provided that the Commission shall apply for the enforcement of its orders directly to the circuit court of appeals. The findings of the Commission as to the facts are to be conclusive. The court's function is restricted to passing on questions of law. The court will determine such questions on the record in the proceeding before the Commission. No new evidence may be adduced on the hearing in court except upon good cause shown, and if the court permits the introduction of additional evidence, such evidence will be taken by the Commission and then filed in court with its new or modified findings based thereon.[13]

Since 1914 Congress has continued to vest trial court functions in newly created agencies and review in the court of appeals, but it has seldom re-articulated its reasons for preferring the court of appeals to the district court. We have found only two such instances.[14] In reporting its bill establishing the Federal Alcohol Administration, the House Finance Committee stated:

> The [review] provision of the bill is similar to that contained in the Packers and Stockyards Act, the Communications Act, the Securities Act, and the Securities Exchange Act as well as the provisions in

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[13] H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914) p. 19. See also the similar explanation given the Senate by one of its conferees, Senator Albert E. Cummings. 51 Cong. Rec. (1914), p. 14768.

[14] We have examined the committee reports of all the statutes identified in notes 9, 10, and 11, *supra*, and the debates respecting some of the most important of them.

> the internal revenue laws under which appeals are taken from the Board of Tax Appeals. . . . Review in the circuit court is thought to be more desirable than review in the district court in order that there may not be the delay and expense consequent upon a lawsuit in the district court and appeal from that court's action to the circuit court of appeals. Further, review of the order is in substance an appellate function which is not within the usual scope of the district court jurisdiction but rather within that of the circuit court of appeals. Review is limited to questions of law as required by the Constitution in the case of a constitutional court . . . . Provision is made, however, by which additional evidence may be adduced before the Administrator even after the case is in court.[15]

And in supporting the review provisions of the Hobbs Act, the House Committee on the Judiciary stated that "the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them, will be presented," so that it would be unnecessary to go "over the same ground twice" by having district court review.[16]

3. *Judicial construction of the direct review statutes.* The desirability of limiting direct review by the courts of appeals to agency orders based upon a quasi-judicial type of proceeding received important expression in *United Gas Pipe Line Co. v. Federal Power Commission*, 181 F.2d 796 (D.C. Cir. 1950), *cert. den.*, 340 U.S. 827. There petitioners sought direct review by the court of appeals of a Federal Power Commission rule respecting the filing of rate schedules. The Commission had followed the rule-making requirements of the Administrative Procedure Act with respect to the submission of written evidence, the holding of a public hearing, and the right to oral argument, but there had been no oral

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[15] H.R. Rep. No. 1542, 74th Cong., 1st Sess. (1935), p. 5.

[16] H.R. Rep. No. 2122, 81st Cong., 2d Sess. (1950), U.S. Code Cong. Serv., p. 4306.

testimony with the right to cross-examine. The Commission "did not hold a quasi-judicial hearing." *Id.*, at 797. The court dismissed the petition, stating that "[o]n its face, the Act contemplates review of a decision based on evidence presented in a quasi-judicial proceeding before the Commission," for it "specifies that the Commission shall file with the proper circuit court of appeals 'a transcript of the record upon which the order complained of was entered. . . .'" The court went on to discuss the importance of such a limitation upon review:

> Review provisions such as 19(b) evidence Congressional recognition that an appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues. The wisdom of thus circumscribing the authority to review is readily apparent in this particular case. For we are asked to . . . make an important decision concerning the scope of the Commission's regulatory authority merely on the basis of allegations in a Petition for Review . . . . Nor do we have the aid of testimony, affidavits, etc. [*Id.* at 798-99.]

See also *Arrow Airways v. Civil Aeronautics Board*, 182 F.2d 705 (D.C. Cir. 1950), *cert. den.*, 340 U.S. 828 (applying the *United Gas Pipe Line* holding to an order of the CAB); *Division of Production, American Petroleum Institute v. Halaby*, 307 F.2d 363, 365 (5th Cir. 1962) (in denying direct review of an FAA order, the court cited *United Gas Pipe Line* and *Arrow Airways* and said that an original action might lie in district court "in which an adequate record can be made"); *Wisconsin v. Federal Power Commission*, 292 F.2d 753, 754-755 (D.C. Cir. 1961). *Cf., Magnolia Petroleum Co. v. Federal Power Commission*, 236 F.2d 785, 791 (5th Cir. 1956), *cert. den.*, 352 U.S. 968; *Humble Oil & Refining Co. v. Federal Power Commission*, 236 F.2d 819 (5th Cir. 1956), *cert. den.*, 352 U.S. 967; *Shank v. Federal Power Commission*, 236 F.2d 830, 834 (5th Cir. 1967), *cert. den.*, 352 U.S. 970.

In thus restricting the scope of direct review statutes to cases in which the court of appeals can perform its traditional role of deciding issues of law upon the basis of an adequate record produced in a quasi-judicial hearing, the lower courts have relied in part upon the following statement by this Court in *Federal Power Commission v. Edison Co.*, 304 U.S. 375, 384:

> The context in § 313(b) indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered." The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

4. *The analogy to Section 106(a).* Against this background, the limitation of Section 106(a) review to those INS orders entered in the context of a Section 242(b) proceeding makes perfectly good sense. Indeed, to construe the statute as respondent seeks would be to depart from the traditional pattern of direct review statutes, for it is Section 242(b), and that section alone, that requires the procedures essential to a quasi-judicial hearing. Thus, in Section 242(b) the Congress has required that the determination of deportability be "made only upon a record made in a proceeding before a special inquiry officer"; that the alien "shall have a reasonable opportunity to be present at the hearing"; that the alien "shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held"; that the alien "shall have the privilege of being represented

(at no expense to the Government) by . . . counsel"; that he "shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government"; and that the special inquiry officer may not have "participated in investigative functions" with respect to the case. Moreover, the statute obviously contemplates that the record of the proceeding be complete and that it be a written record, and therefore the regulations specifically require that the "hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer" and that the record shall consist of "[t]he hearing . . . including the testimony, exhibits, applications and requests, the special inquiry officer's decision, and all written orders, motions, appeals, briefs, and other papers filed . . . ." 8 C.F.R. 242.15.[17] Finally, a section of the Hobbs Act incorporated by reference into Section 106(a) contains a provision paralleling the transcript filing requirement that the court in *United Gas Pipe Line* relied upon.[18]

Moreover, where issues other than deportability are by regulation dealt with in the Section 242(b) proceeding, as was the question of suspension of deportation involved in *Foti*, it is clear enough on the face of the regulations that the same procedural safeguards are applicable even though not required by statute. See 8 C.F.R. 242.[19] That was ev-

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[17] For an excellent example of how courts vigorously enforce quasi-judicial procedural requirements in a Section 242(b) proceeding, see *Chung Yong Chew v. Boyd*, 309 F.2d 857 (9th Cir. 1962).

[18] "Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title." 28 U.S.C. 2346.

[19] The single exception is specified: "In exercising discretionary powers to grant or deny an application under this paragraph, the special inquiry officer may consider and rely upon information not contained in the record, provided the Commissioner has determined that it is in the interest of the national security and safety to do so." 8

idently the practice under previous regulations, see *Jay v. Boyd*, 351 U.S. 345, 351-352, 353, 359-360; and we understand is the practice today. We add that if it were not, under our view of the statute such orders would not be entered "pursuant to administrative proceedings under Section 242(b) of this Act" within the meaning of Section 106(a). It is not merely the office of the person who enters the order that is significant. It is the full range of procedural requirements of Section 242(b) that is controlling.

In contrast to Section 242(b) proceedings, where discretionary relief, such as the stay of deportation involved in the case at bar, is denied wholly outside such proceedings no particular procedure is required by statute. Moreover, the regulations require merely that a request for a stay be made "on Form I-246" and filed with the district director, and that "[w]ritten notice of the disposition of the alien's request shall be served upon him." 8 C.F.R. 243.4. The regulations also explicitly provide that denial of a stay "is not appealable."[20]

In conformity with this regulation, the "record" of respondent's action in this case, as we have noted (*supra* p. 2), consisted simply of a one-page form application for stay

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C.F.R. 242.17(a). See also 8 C.F.R. 242.17(c). A similar provision was upheld in *Jay v. Boyd*, 351 U.S. 345. *Cf. Knauff v. Shaughnessy*, 338 U.S. 537; *Shaughnessy v. Mezei*, 345 U.S. 206.

Because it is not relevant to this case, we do not discuss to what extent the procedural rights guaranteed by Section 242—or perhaps some in addition to those so guaranteed—might be required by the Constitution in connection either with deportation or with denial of discretionary relief. See, *e.g.*, *Jay v. Boyd*, *supra* (dissenting opinions); *Wong Yang Sung v. McGrath*, 339 U.S. 33; *Marcello v. Bonds*, 349 U.S. 302; *Brownell v. Tom We Shung*, 352 U.S. 180, 182 n. 1; *Cakmar v. Hoy*, 265 F.2d 59 (9th Cir. 1959).

[20]The Board of Immigration Appeals can, however, grant a stay in connection with a motion to reopen or to reconsider a determination by the Board, *ibid.*, as can the special inquiry officer under a recent amendment to the regulations, 8 C.F.R. 242.22, as amended by 33 Fed. Reg. 2380.

to which was appended a two-page form statement of grounds petitioner asserted for classification as a refugee, together with a brief letter from the Acting District Director denying the stay. In that letter, as we have also noted, the Acting District Director relied upon grounds that evidently were obtained either from the record of the Section 242(b) proceedings or conceivably from oral conversations that were not transcribed. Moreover, so far as the record discloses petitioner was not represented by counsel in connection with seeking the stay, and there was no intra-agency appeal because the regulation prohibits appeals.

This is far removed indeed from the procedures employed by independent agencies and the procedures required where actions of other Executive agencies are subject to direct review in the courts of appeals. To be sure, the subject of judical review of agency actions defies completely exhaustive research and is sprinkled with exceptions to every rule. But so far as we can tell Section 106(a), if construed as respondent urges, would stand alone in requiring direct review by three judges of a court of appeals of the action of a subordinate agency official not based upon a quasi-judicial type proceeding and not even appealable within the agency. And if it would not stand alone, clearly it would have very little company.

Moreover, the difficulties of extending Section 106(a) to such cases are plain. While in this case there is evidently no dispute respecting the relevant facts or the grounds for the Acting District Director's action, this is merely fortuitous. It takes no great play of the imagination to think of situations involving applications for stays in which the absence of an adequate record would be fatal to informed review by a court of appeals. Stays can be sought on any ground, and without a record it may be impossible for the court of appeals even to tell upon what basis the request was denied, much less whether that basis was supportable in law or in fact.[21]

[21] The problem of defining with precision the scope of judicial review of discretionary orders in deportation cases is complex. See discussion

And the same can be said about the other types of action the INS takes outside of Section 242(b) proceedings, such as the denial of visa petitions seeking preferred immigration status or the denial of applications for waiver of the foreign residence requirement for aliens who were admitted as exchange visitors (see Resp. Br. p. 30). The latter form of relief, for example, can be granted by the Attorney General upon a determination that departure "would impose exceptional hardship upon the alien's spouse or child (if . . . a citizen of the United States or a lawfully resident alien)." If the court of appeals does not know, because there has been no hearing and there is no full record, whether relief was denied because there was no "exceptional hardship" or because the spouse was not a citizen or a "lawfully" resident alien, or what facts were relied upon to support either determination, the court is ill-equipped to review the case.[22]

Thus there is good reason to conclude that the Congress acted advisedly in providing that Section 106(a) is to apply only to orders rendered pursuant to Section 242(b) proceedings, and that the result is not only defensible but desirable.

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and cases collected in 2 Gordon & Rosenfield, *Immigration Law & Procedure* (1967) §§ 8.14-8.15. However, the procedural problems faced by courts of appeals in reviewing orders in the absence of a quasi-judicial agency hearing exist whether the standard of review is the stringent "abuse of discretion" formula appropriate for the act of discretionary judgment itself, the "substantial evidence" standard evidently appropriate for testing a determination that the alien did not meet the statutory qualifications for the grant of discretionary relief, or some intermediate standard. As to the appropriate standards for various types of actions, in addition to the cases cited in Gordon & Rosenfield, *supra*, see *Foti v. Immigration Service*, 375 U.S., at 228.

[22]For a good example of a case in which, because the summary procedures employed by the INS in denying discretionary relief had not produced an adequate record, the court first remanded the case for an evidentiary hearing and then permitted the alien to take depositions, see *Vucinic v. Immigration & Naturalization Service*, 243 F. Supp. 113 (D. Ore. 1965). See also *Attorney General v. Buffalino*, 322 F.2d 1016, 371 F.2d 738 (D.C. Cir. 1963, 1966); *cf. Accardi v. Shaughnessy*, 347 U.S. 260.

5. *A possible objection.* There is, we note, one factor that robs our analysis of perfect theoretical symmetry, but that does not destroy its practical force. A section of the Hobbs Act incorporated by reference into Section 106(a) provides that, where no agency hearing was either held or required, and where there is a material issue of disputed fact, the court of appeals may transfer the case to the district court for trial. 28 U.S.C. 2347(b). Thus, if respondent's construction of the statute were adopted, it is true that the courts of appeals would not be helpless when confronted with a relevant factual controversy. But the single point at issue is whether it is reasonable to attribute to the Congress the purpose apparent on the face of the statute—restriction of direct appeals to orders entered in the context of a Section 242(b) proceeding. In those terms, even apart from the doubtful strength of inferences drawn from a provision incorporated by reference and nowhere mentioned in the legislative history, our position is unimpaired. Surely the Congress could reasonably have thought that expedition would be better achieved on the whole by permitting direct review only where there would be no opportunity for skillful pleaders to secure a *three* stage review—court of appeals, district court, court of appeals—by raising a material dispute of fact. Moreover, a quasi-judicial proceeding does not serve merely to afford a basis for review of factual issues. A trial-type proceeding generally results in a sharpening of the legal issues and in a full disclosure of the grounds upon which the agency takes action. Full disclosure, indeed, is an implicit requirement of Section 242(b) and an explicit requirement of the regulations. 8 C.F.R. 242.18. It was hardly unreasonable for the Congress to have secured to the courts of appeals those aids to appellate review that are traditionally theirs.[23]

[23] It may be noted in this connection that the transfer provision seems superfluous in the Hobbs Act itself. We have, as we have indicated, been unable to identify any type of order reviewable under that Act in which an agency hearing is not required. The provision seems to have been included out of an abundance of caution.

6. *Decisions under Section 106(a).* While we cannot say that any lower court opinion construing Section 106(a) is squarely based upon the foregoing analysis, neither are the opinions barren of any reference to it. The most extensive discussion is contained in Judge Friendly's opinion in *Foti*. He noted that direct review by three judges is "normally applied solely to 'quasi-judicial' agency determinations made on a record available for the court's inspection, and only to some of those"; he pointed to the "comprehensive procedure" and "specification of procedural safeguards" in Section 242(b) in contrast to the sections governing discretionary relief; and he said that to hold that orders denying such relief were within Section 106(a) would "represent a further deviation from the established pattern" of review of administrative actions. 308 F.2d at 780, 782, 788. While he erred in treating as irrelevant the fact that Section 242(b) procedures govern discretionary determinations where those determinations are by regulation made in the context of the Section 242(b) proceeding, this does not destroy the soundness of his basic analysis as it is relevant to the case at bar.[24]

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[24] For similar suggestions respecting the desirability of restricting Section 106(a) review to orders entered pursuant to the procedural requirements of Section 242(b), see *Lam Man Chi v. Bouchard*, 314 F.2d 664, 673 (3d Cir. 1963) (the role of the officer in denying the discretionary relief there involved was "not adjudicatory . . . while an order entered under § 242(b) is the result of an adjudication process. . . ."); *Zupicich v. Esperdy*, 207 F. Supp. 574, 578-580 (S.D.N.Y. 1962) (as to withholding of deportation under Section 243(h), "the role of the Special Inquiry Officer does not involve adjudication, as it does under § 242(b)," and the decision of the Attorney General "is based not only upon the special facts of each case elicited through the administrative proceedings, but also upon information and knowledge obtained through governmental channels," whereas Section 106(a) is addressed to determinations "based on a record in an administrative hearing.").

B. The Only Direct Evidence of Legislative Intent Supports Restricting Section 106(a) Review to Orders Entered in the Context of a Section 242(b) Proceeding.

Since the language of the statute is plain and since the result of according the statute its plain meaning is not unreasonable, but rather promotes a policy reflected in a considerable body of prior legislation respecting judicial review, it is highly unlikely that the committee reports or the debates could justify a different interpretation of Section 106(a) whatever their character. But no problem of that sort arises in this case, because to the extent that there is directly relevant legislative history, it supports our position, not respondent's.

The Government says (Br. pp. 22, 23) that there is in the legislative history no "definitive" or "particularized" explanation of the "pursuant to administrative proceedings under section 242(b)" language of Section 106(a). Indeed, the Government cites no legislative history at all as bearing directly upon that phrase. The record, however, is not entirely barren.

In 1961 during the House debate on H.R. 187, the provisions of which were later added by the House as an amendment to the Senate bill that was enacted as Section 106, Representative Libonati opposed the direct review requirement because he thought the INS proceedings would not lay an adequate basis for appellate review.

> We know that under such a situation they . . . [the court of appeals] cannot inquire as to anything beyond the written record. We know further that no written record would be supplied to the petitioner in that proceeding. It would merely be a systematic method of disposing of the case at the earliest opportunity without any question as to the relevant facts that might be brought into the case by the petitioner in a district court hearing by a Federal district judge. [107 Cong. Rec. 12179.]

In reply, Representative Walter, the chairman of the subcommittee that had conducted the hearings and the manager of the bill, did not deny that a full record was necessary for effective appellate review, but rather said in substance that there would be such a record because of the procedures of Section 242(b).

> MR. WALTER. I respectfully invite the gentleman's attention to the law in section 242, in which the procedure for the examiner is set forth in detail. The gentleman apparently has not seen this section. [*Ibid.*]

He could not have responded in this fashion, of course, had he thought that orders would fall within Section 106(a) even though they had not been entered in the context of a Section 242 proceeding. Nor did any Congressman challenge Mr. Walter's statement on the ground that in some circumstances the Section 242 record would not be relevant to the order appealed under Section 106(a).

To this evidence should be added the consideration that in limited circumstances the INS is authorized to conduct summary deportation proceedings. See 1 Gordon & Rosenfield, *Immigration Law and Procedure* (1967), § 5.11. The most prominent example is Section 252(b), 8 U.S.C. 1282 (b), which permits summary deportation of any alien crewman if it is determined that he "is not a bona fide crewman, or does not intend to depart on the vessel or aircraft which brought him. . . ." Thus, while it is scarcely possible that the Congress meant in Section 106(a) to distinguish deportation proceedings generally from exclusion proceedings, it is not so unlikely that it may have meant to distinguish Section 242(b) deportation proceedings from other types of deportation proceedings; and the key difference between these deportation proceedings is that Section 242 (b) provides a plenary hearing whereas the other provisions permit summary action. See *United States v. Esperdy*, 188 F. Supp. 491 (S.D.N.Y. 1960). And see particularly *Vucinic v. Immigration & Naturalization Service*, 243 F. Supp. 113 (D. Ore. 1965), where the court held Section 106(a) not

applicable with respect to discretionary relief denied in the context of a summary deportation proceeding under Section 252. It is pertinent to inquire whether the respondent would contend that *Vucinic* was wrong and that such an order should be appealable under Section 106(a) because it affects deportation, even though under no theory could it be said to have been entered pursuant to deportation proceedings under Section 242(b) rather than Section 252.

C. The Legislative History Relied upon by Respondent Does Not Support Its Position.

While respondent cites no legislative history dealing directly with the pertinent language in Section 106(a), it does rely heavily upon a chart contained in two House reports and reproduced as Appendix B to its brief. We may be overlooking something, since we get nothing at all out of this chart while respondent claims that it is "decisive" and that it "unmistakably portrayed" the "intent of Congress to include motions for stay of deportation within the coverage of Section 106(a)." (Br. p. 27). But neither on the face of the chart nor in the body of the reports does there appear any statement, or even we think any suggestion, that INS action taken in connection with all of the steps outlined in the chart was to fall under Section 106(a). Indeed, several of the procedures identified in the chart are obviously irrelevant to such review—"election of country by deportee," "private legislation," "assurance of foreign country to accept alien," "termination of proceedings," "voluntary surrender," "departure verified." It is perfectly clear, we submit, that this chart cannot be regarded as anything but an itemization of all of the possible stages in a deportation proceeding without reference to the scope of Section 106(a). Indeed, that is exactly what the Committee said it was: a chart "outlining administrative procedures in deportation cases" printed "for reference purposes." H.R. Rep. No. 423, 86th Cong.

1st Sess., p. 19; H.R. Rep. No. 565, 87th Cong. 1st sess., p. 26.[25]

IV.

THE LOWER COURT'S INTERPRETATION OF SECTION 106(a) WOULD NOT HAVE UNTOWARD PRACTICAL CONSEQUENCES.

Respondent's position is rooted in large measure in its conviction that, if Section 106(a) is construed so as to exclude orders not entered in the context of a Section 242(b) proceeding, the INS will be seriously disabled in its efforts to execute deportation orders promptly. Respondent's major concerns are that in general the addition of another stage of judicial review will produce delays, and also that if the alien is permitted to raise issues both in the district court and in the court of appeals, the resulting "bifur-

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[25] Respondent also states that "the colloquy during the 1959 House debates between Representatives Walter, Lindsay and Moore . . . is highly significant," because it "portrays a clear intent that determinations directly affecting deportation orders, although made after the primary deportation proceeding, would be subject to the exclusive review procedure prescribed by Section 106(a)" (Br. pp. 12-13). Even if true, this would mean no more than that orders such as the motion to reopen the deportation proceeding involved in *Giova* were considered to be within Section 106(a). We take it respondent means no more, and does not rely upon this debate to establish that orders entered wholly outside the deportation proceeding are subject to Section 106(a). Such reliance would be wholly misplaced. Congressman Walter concluded the discussion by stating that the six-month period of limitation—the subject of the colloquy—"applies to the final administrative adjudication of the applications for suspension of deportation *just as it would to any other issue brought up in deportation proceedings.*" Thus, if the discussion means anything, it supports our view that Section 106(a) is limited to issues disposed of in the "deportation proceeding." This was the Ninth Circuit's interpretation. *Yamada v. Immigration & Naturalization Service*, 384 F.2d 214, 216-217 (1967).

For the convenience of this Court, we have reproduced this debate in Appendix C, *infra*.

cation" of review will breed confusion, waste, and even more delay. The point evidently is that if the practical consequences of the lower court's reading of the statute are this undesirable, common sense suggests that the Congress could not have intended that the statute be so read.

But if what we have said to this point is substantially correct, an evaluation of the practical impact of the lower court's decision is not material. It was reasonable for the Congress to qualify its general purpose to secure expedition by a more specific purpose to restrict court of appeals review to orders entered in quasi-judicial proceedings; the language of the statute clearly indicates that is exactly what the Congress intended, and such legislative history as there is also supports that view. The resulting delays, accordingly, must be regarded as the price to be paid for adhering to traditional patterns of judicial review; and if "bifurcation" is in some circumstances another result, it too must be tolerated. As this Court said in another case in which it held that the statute permitted no escape from a bifurcated review of certain SEC orders, "Whether a better procedure could be devised is not for us to determine." *General Protective Committee v. Securities & Exchange Comm'n*, 346 U.S. 521, 535-36.

But in any event, as we now show, the probable practical consequences of the lower court's decision do not argue against its affirmance.

A. The Effect of the Lower Court's Decision in Terms of Speedy Judicial Review.

Regrettably, it is not possible to measure in any reasonably precise way the consequences of the lower court's decision upon the speed with which deportable aliens can be ushered out of the country. Respondent starts out ahead on this point, since in any given case the probabilities are that, if district court review can be avoided, the end of litigation is closer than if it cannot. But not necessarily. If the challenge

to the order raises a substantial issue of fact, then as we have noted (*supra*, p. 30) the court of appeals would have to invoke the transfer provision of the statute to remand the case to the district court for trial, to be followed by appeal—a three-stage review. Since there is no way of knowing what proportion of cases in the past have involved factual disputes, and no way of predicting how the incentive of this additional delay would affect that proportion in the future, there is no way of assessing the overall net gain in expedition that would be produced under respondent's construction of Section 106(a).

The problem is further complicated by the fact that Section 106 cannot possibly be read to eliminate two-stage review in all situations. In Section 106(a)(9), the Congress specifically preserved *habeas corpus* for aliens held in custody, and in Section 106(a)(5) it provided a district court *de novo* trial for substantial claims of United States nationality. This carves out a large block of cases in which initial review will necessarily be in the district courts.

Moreover, it should be noted that much less is at stake in this case than was in *Foti*. As the Court noted in *Foti*, "[d]eportability is conceded in about 80% of the cases." 375 U.S., at 227 n. 13. Accordingly, had Section 106(a) been limited to review of the question of deportability, it would have been applicable in but 20% or so of the contested cases. But the impact of restricting direct review to orders entered in the context of Section 242(b) proceedings would be far less substantial, since by regulation most determinations respecting discretionary relief are now passed upon in the Section 242(b) proceeding and hence fall within Section 106(a) under *Foti*.[26]

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[26]The respondent in a Section 242(b) proceeding may apply to the special inquiry officer for suspension of deportation under Section 244 (a), for adjustment of status under Section 245, for creation of a record of lawful admission for permanent residence under Section 249, for voluntary departure in lieu of deportation pursuant to Section 244(c), or for temporary withholding of deportation pursuant to Section 243(a). 8 C.F.R. 242.17(a), (b), and (c).

Finally, should the INS conclude that direct review even of this remaining group of orders is essential, the INS can insure such review by amending its regulations to require that these orders be entered in the Section 242(b) proceeding just as it has done with respect to other forms of discretionary relief. This is the solution proposed by the Ninth Circuit Court of Appeals in *Yamada v. Immigration and Naturalization Service*, 384 F.2d 214, 217 (1967).

Respondent concedes that this sort of change in administrative practice might to some extent be possible and desirable, but sees two principal difficulties. First, respondent says that some matters "usually can best be handled by district directors rather than special inquiry officers" (Br. p. 42). We have no way of evaluating the practical administrative problems in transferring duties from district directors to special inquiry officers. But even if those probems are substantial, there seems to be no reason why the regulations could not grant the alien the right to appeal to the special inquiry officer from an adverse determination by the district director, with all of the procedures of Section 242(b) coming into play at that point. If such a right were granted, the denial of the requested relief, if affirmed by the special inquiry officer and the Board of Immigration Appeals, would fall within Section 106(a) under *Foti*.

The INS' second objection to the amendment of regulations approach is that it would not be effective to secure direct review where the discretionary relief is sought after the termination of the Section 242(b) proceedings, and that such a delay is fairly typical because many of the applications for relief are based upon changed circumstances (Br. pp. 42-43). But we do not see the problem. All that would be required would be an amendment of the regulations permitting such issues to be raised by way of a motion to reopen the Section 242(b) proceeding. Under *Giova*, the questions would then be subject to Section 106(a) review.

B. The "Bifurcation" Problem.

An analysis of the problem of "bifurcated review" should begin with a precise understanding of what it is and what it is not, particularly as distinguished from successive judicial review proceedings. No one contends that Section 106(a) can be interpreted in such a way as to insure that there will be but one court action in every deportation case. As respondent points out (Br. pp. 39-43), what it terms "subsequent determinations" respecting discretionary relief often can quite properly be sought by aliens after the close of the deportation proceedings, and even after the close of judicial review of one or more issues raised in those proceedings. Accordingly there can quite properly be more than one judicial action. As respondent also correctly observes, the Congress "nowhere stated that it was restricting every litigant to one proceeding" (Br. p. 39).

While respondent's reading of Section 106(a) would result in each successive contest being heard in the court of appeals, whereas our reading would permit one review to be heard in one court and a later in another depending upon the procedural context in which the challenged determinations are made, if this is "bifurcation" it cannot be regarded as particularly serious. About all that could usually be said would be that some general knowledge about the case would go to waste; but even this assumes that the second action, if brought directly in the court of appeals, would be heard by the same panel that decided the first.

Moreover, it may be noted that this type of "bifurcation," if that be what it is, may also occur under respondent's view of Section 106(a). Respondent concedes that what it terms "antecedent determinations"—"determinations leading to the institution of proceedings" such as denial of an application for an extension of a temporary stay—cannot be appealed under Section 106(a) "[w]hen there has been no deportation proceeding or order" at the time review is sought (Br. pp. 25, 31 n. 16). There are a number of different determinations of this sort. See, e.g., 8 C.F.R. 103.1(e). If a depor-

tation proceeding is instituted and results in a deportation order after district court review of such an "antecedent" order, issues involved in that proceeding would be appealable to the court of appeals. Hence there would be "bifurcation" in the sense of successive initial reviews of different issues in different courts. (And what would be the result if the Section 106(a) petition were filed *prior* to termination of district court review?)

The type of "bifurcation" that may reasonably be viewed as a significant problem occurs where discrete issues arising out of the INS' efforts to deport an alien are reviewed *simultaneously* by two different courts. But even in such a case "bifurcation" need not be as bad as it sounds. Where an alien files a petition in the court of appeals as to some issues and a complaint in the district court as to others, the sensible thing for the court of appeals to do is simply to defer the hearing of the Section 106(a) petition until disposition of the case in the district court. Any appeal from the district court's judgment can then be consolidated with the Section 106(a) petition. Admittedly, this expedient would not be available if the district court suit were brought in a different circuit than the Section 106(a) proceeding. In such circumstances, however, it is hard to believe that the district courts would not entertain sympathetically motions by respondent to transfer venue under 28 U.S.C. 1404.[27]

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[27]There seems no danger that the Section 106(a) petition might have been filed in a circuit not embracing any district in which the district court action "might have been brought" within the meaning of 28 U.S.C. 1404. Under Section 106(a)(2) the venue of petitions for review is "in the judicial circuit in which the administrative proceedings . . . were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner." Declaratory judgment actions against the INS can, under 28 U.S.C. 1391(e), be brought in the district in which the plaintiff resides or in which the cause of action arose. See 2 Gordon & Rosenfield, *Immigration Law and Procedure* (1967), § 8.9(a).

More importantly, however, "bifurcation" of the sort that may cause difficulties need not result at all. If the INS amends its regulations in the fashion previously described, all issues affecting the deportation order will be appealable under Section 106(a). Moreover, even absent changes in the regulations, the ancillary jurisdiction doctrine may be employed to prevent bifurcation. As respondent said in its *Foti* brief (p. 7 n. 5), "where the petition for review challenges both the determination of deportability and the denial of discretionary relief, the court of appeals has jurisdiction, under the principle of 'pendent jurisdiction' (cf. *Hurn v. Oursler*, 289 U.S. 238; *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 380-381), to hear and determine the entire controversy. See *Lefson v. Esperdy*, 211 F. Supp. 769 (S.D.N.Y.), and *Pezzulich v. Esperdy*, unreported (S.D.N.Y., 60 Civ. 497, decided February 23, 1962), so holding." By the same token, where the alien seeks review under Section 106(a) of issues decided in the Section 242(b) proceeding, the court of appeals has ancillary jurisdiction to determine other issues that otherwise would be reviewable in the district court in the first instance.[28] Re-

[28] The Court of Appeals for the Seventh Circuit seems to have applied the ancillary jurisdiction doctrine to support review of discretionary determinations even where it considers that there is no "final order of deportation" within the meaning of Section 106(a) that has been appealed. See *Blagaic v. Flagg*, 304 F.2d 623 (1962); *Melone v. Immigration & Naturalization Service*, 355 F.2d 533 (1966); *Skiftos v. Immigration & Naturalization Service*, 332 F.2d 203, 204 (1964); *Roumeliotis v. Immigration & Naturalization Service*, 304 F.2d 453 (1962). The Government disclaimed any such theory in *Foti* (Br. pp. 48-49 n. 28) and does not urge it here as a basis for jurisdiction. We know of no authority whatever for the notion that a court can assume ancillary jurisdiction over an issue because of the relationship of that issue to another issue *that is not raised.* Rather, the law seems clear that, where there is no primary issue of which the court has jurisdiction, there is nothing to which any other issue can be ancillary, and the court is barred from adjudicating the so-called "ancillary" issues. See, *e.g.*, the discussion and cases cited in 1 Barron & Holtzoff, *Federal Practice and Procedure*, § 23; 2 *Cyclopedia of Federal Procedure* (1965 ed.), § 2.417.

spondent seems to regard this doctrine as applicable to "antecedent orders" where a deportation order is subsequently entered and appealed (Br. pp. 26, 30). There is no reason why it would not be equally applicable to "integral" and "subsequent" orders, to use the respondent's terminology.

Finally, it is worth noting that respondent has not cited any actual examples of bifurcated appeals despite the fact that two of the three courts of appeals most heavily engaged in deportation cases—the Second and the Third Circuits (see *infra* p. 42)—have rejected respondent's view of Section 106(a). Evidently those courts are either adopting satisfactory procedures to deal with the problem, or they are applying the ancillary jurisdiction doctrine to eliminate the problem, or the problem is theoretical rather than real.

C. Burden on the Courts of Appeals.

Respondent discerns in the lower court's decision an "unexpressed, but implicit" concern about being overburdened if Section 106(a) were broadly read (Br. p. 34). Whatever the lower court's fears, this issue seemed relevant, and we therefore asked the INS to secure whatever data were available. The INS responded generously and promptly, and the resulting tabulations, together with an explanatory memorandum by the INS, are attached hereto as Appendix B.

At first glance, the data seem to show that a large number of cases would be controlled by this Court's decision. Thus, in the three-year period from March 1, 1965 to February 29, 1968, 975 such cases were brought in either the district court or court of appeals, in contrast to but 328 cases not affected by the jurisdictional question presented here. Moreover, 677 of those 975 cases were in the Second Circuit, 142 in the Third Circuit, and 102 in the Seventh Circuit.

Two factors, however, indicate that the problem is not as serious as might appear. First, the INS points out in its memorandum that "704 of the above 975 cases . . . involved

aliens of Chinese ancestry who collectively only raised two or three substantive issues," and that "scores of these cases are usually resolved by the decision in a single case. . ." (*infra* p. B-2). The validity of that observation is supported by the record in the case at bar, where as respondent notes (Br. p. 4 n. 6) "[b]y stipulations and courts orders in the Third Circuit, approximately 119 pending cases are covered by the disposition of the *Chung* (No. 637) and *Kwok* (No. 638) cases. Of these, 45 are controlled by *Chung*, 69 by *Kwok*, and five by both cases."

Moreover, even if all of these cases were brought in the district courts, many of them would probably be appealed. While there is reason to believe the number of appeals in immigration cases is rather small,[29] where there is an appeal the case ultimately occupies the time of four judges.

In short, while it seems clear enough that acceptance of respondent's position would result in some additional burden on the courts of appeals, we do not believe the available evidence establishes that this burden would be so extraordinary that it should be presumed that the Congress could not have intended it.

D. Impetus Toward Consolidation of Issues in One Proceeding.

The Ninth Circuit Court of Appeals considered important the fact that, if direct review turns upon whether issues are decided in a Section 242(b) proceeding, the INS will have an incentive to amend its regulations to place more discretionary determinations within that proceeding. This, in turn, would tend to reduce multiple litigation, since the various

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[29] Regrettably, the only data we could find are rather old. Those data are INS figures indicating that in 1957 only 13 of 215 district court cases went to the courts of appeals and in 1956 only 12 of 165. Hearing before Subcommittee No. 1 of the House Committee on the Judiciary, 85th Cong., 2d Sess., on H.R. 13311, July 10, 1958, pp. 7-11.

issues could be consolidated in a single petition for review at the termination of the Section 242(b) proceeding. And, the court observed, one of the concerns of the Congress was multiple litigation. See the detailed discussion in *Yamada v. Immigration & Naturalization Service*, 384 F.2d 214 (1967).

As we show later, it is certainly true that the Congress regarded repeated court actions challenging various orders of the INS as undesirable. And we have already discussed the INS' objections to the practicability of amending its regulations in the fashion visualized by the Ninth Circuit. We do concede that such modifications of procedure would not by any means eliminate multiple litigation, since petitions for discretionary relief are often based upon factual or legal developments occurring after termination of the Section 242 (b) proceeding. However, we do not understand the respondent to contend that no benefits whatever would be realized from revisions in the regulations. Accordingly, it seems clear enough that at least some substantial collateral advantages in the way of minimizing successive lawsuits could be secured as a consequence of the lower court's interpretation of Section 106(a).

E. The Virtues of a Certain Rule.

If the unhappy experience of judicial consideration of Section 106(a) teaches anything beyond the desirability of better legislative draftsmanship, it is the essentiality of a simple and clear rule for identifying Section 106(a) issues. Under the lower court's approach, an order is directly appealable under Section 106(a) if, but only if, it is decided either in the Section 242(b) proceeding or, as in *Giova*, in a motion to reopen that proceeding. That is about as workable a rule as can be devised. Under respondent's approach, the test is the more amorphous consideration of "the application's relationship to the deportation order" (Br. p. 31). While that standard is clear enough with respect to applications for the suspension or the stay of a deportation

order, respondent admits that "the practical situation is somewhat different . . . in regard to subsequent determinations which do not deal directly with a deportation order, but which would eventually result in its mitigation or extinction. Examples . . . are the denial of visa petitions seeking preferred status . . . . and of applications for waiver of the foreign residence requirements for aliens who were admitted as exchange visitors . . ." (Br. p. 30). Plainly enough, if the Court adopts respondent's interpretation of Section 106(a) with respect to orders denying stays, but does not go further and catalog other representative orders of the different types identified by respondent as falling within or without Section 106(a), another round of litigation is in prospect.

V.

RESPONDENT'S EMPHASIS UPON THE PRIMARY ROLE OF SECTION 106(a) IN SECURING EXPEDITION IS MISPLACED.

Respondent's position respecting Section 106(a) is apparently influenced in some measure by its conception of that provision as the "crucial" and "primary" aspect of the 1961 legislation. It is true that this characterization of the provision gains support from this Court's remark in *Foti* that the "key feature of the congressional plan" was the elimination of district court litigation. Perhaps the Court meant simply that this was the "key feature" of subsection (a) of Section 106, not of the entire statute. At any rate, it was not important in *Foti* to draw fine adjectival lines in terms of whether the direct review provision was a "key," "significant," or "material" element in the legislative plan. Nor is it important here, in view of the considerations we have already discussed. However, since respondent evidently thinks otherwise, we have included in Appendix A hereto a detailed examination of the legislative history that demonstrates that the direct review provision was not regarded

by the Congress as the main weapon it was giving to the INS in the Section 106 package. At this point, we merely summarize the most salient points in our analysis.

On the face of the statute, it is clear that the Congress devised a battery of procedural safeguards to obviate what it considered abuses of the judicial process in deportation cases. Thus, in addition to the subsection (a) elimination of district court review, the Congress in subsection (a)(1) imposed a 6-month statute of limitation; in subsection (b) restricted review of exclusion orders to *habeas corpus* proceedings, thereby overturning this Court's decision that such orders could be reviewed in declaratory judgment actions (*Brownell v. Tom We Shung*, 352 U.S. 180); and in subsection (c) required exhaustion of administrative remedies and strict application of *res judicata* in both *habeas corpus* and Section 106(a) review proceedings, and precluded any judicial review once the deportation is accomplished.

The committee reports and the debates indicate that, among these various provisions, the Congress did not regard elimination of district court review as the most important. What troubled the Congress was that some notorious aliens —by virtue of what the House, at least, considered overly liberal court decisions—had avoided deportation for many years by bringing numerous successive lawsuits, both by way of declaratory judgment and by way of *habeas corpus*, challenging different aspects of the issuance of deportation orders. Accordingly, the principal focus of the Congress was on the exhaustion of remedies requirement, the six month statute of limitation, and the application of *res judicata*. Also, the Congress was concerned that, if exclusion orders could be tested in declaratory judgment proceedings as this Court had held, undesirable aliens would be able to enter the country and be at large during the often protracted course of judicial review. The limitation of such aliens to *habeas corpus* proceedings was designed to prevent that.

In short, while the direct review provision was *one* of the measures designed to expedite deportation, it was not regarded by the Congress as the "primary" measure.

CONCLUSION

For the reasons given above, the judgment of the lower court should be affirmed and the case remanded to the Court of Appeals for dismissal of the petition for lack of jurisdiction.

Respectfully submitted,

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APPENDIX A

Legislative History of Section 106

1. *The House Report.* The House report on the legislation described the measures listed above—the 6 months statute of limitations, the application of *res judicata*, the exhaustion requirement—as designed to expedite deportation proceedings. Thus, for example, the committee stated: "Most important is the fact that the alien may not have a petition for review or for habeas corpus entertained, unless his new petition presents grounds which could not have been presented in the prior proceeding, or unless the court finds that the remedy provided for such prior proceeding was inadequate or ineffective to test the validity of the order." H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), p. 29. Also,

> In an effort to curtail, if not to eliminate repetitious and unjustified appeals to courts for interference with the enforcement of deportation orders, the section declares that an order of deportation or of exclusion shall not be reviewed by a court if the alien has not exhausted his administrative remedies, or if he has departed from the United States. A subsequent petition for review or for habeas corpus will not be entertained if the validity of the order of deportation has been previously determined in any judicial proceeding, unless the new petition presents grounds which the court finds could not have been presented previously, or the court finds that the remedy in the previous proceeding was inadequate or ineffective to test the validity of the order. [*Id.*, at p. 28.]

There is but a single specific reference to the direct review provision, and it does not support even the view that this provision was aimed at expedition, much less that the provision was the most important of the various requirements designed to prevent unreasonable delay. The committee simply said:

> Section 5 [Section 106] of the instant bill contains a number of features which fully establish the propriety and form of judicial review made available to aliens involved in deportation proceedings. The forum is the U.S. court of appeals, where judicial review has been provided for many years respecting orders of other administrative agencies. Since deportation proceedings deal with the liberty of persons rather than mere property, the committee has concluded that granting an initial review in an appellate court gives the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges. [*Ibid.*]

There was some suggestion in the debates that this explanation of the direct review provision as designed to aid the alien was disingenuous.[1] However that may be, and although there is, as we shall indicate, evidence in the debates that at least one reason for direct review was to speed deportation, the point is that the primary evidence of legislative intent, the committee reports, do not support respondent's view that the direct review provision was regarded by the Congress as central to its main purpose.[2]

2. *The House debates.* The debates in the House ranged over several years, since on three occasions prior to enactment of Section 106 it had passed virtually identical bills.[3]

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[1] Congressman Lindsay said that he could not "credit the argument": "District courts deal with questions of 'rights' and 'security' in every criminal prosecution; yet we do not consider that in this area district courts 'give' less 'rights' or 'security' than appellate courts." 105 Cong. Rec. 12729 (1959).

[2] There was no Senate report.

[3] H.R. 13311, 85th Cong., 2d Sess., was passed in 1958, 104 Cong. Rec. 17179; H.R. 2087, 86th Cong., 1st Sess., was passed in 1959, 105 Cong. Rec. 12729; and H.R. 187, 87th Cong., 1st Sess., was passed in 1961, 107 Cong. Rec. 12181, during the same session in which Section 106 was added by the House as an amendment to a Senate bill, S. 2237, and finally enacted. Each of the House bills died in the Senate Judiciary Committee

In general, in those debates, as in the House report, the proponents of the bill described the evil to be remedied primarily in terms, as Mr. Walter put it, of aliens "returning to various courts" and "going from court to court" under the "most frivolous and most arrogantly raised claims," or using judicial review "repeatedly and interminably for the sole purpose of remaining in the United States during the pendency of the never-ending litigation"; or of there being "no [res judicata] limit under existing law" so that "the questions which have been determined and which could have been determined in such cases are tried over and over again"; or, as Mr. Poff put it, of aliens "shopping about for legal forums with congested dockets, by filing frivolous and dilatory pleas, and by calculated abuse of the Habeas Corpus Act." Obviously the major problem was thought to involve something quite different from simply the exercise by aliens of the right to a two-stage review of a deportation order rather than a one-stage court of appeals review. 107 Cong. Rec. 12175 (1961); 107 Cong. Rec. 18286 (1961); 105 Cong. Rec. 12726 (1959).

This view is reflected also in the diagnosis by leading supporters of the legislation of the principal cause of the problem to which the legislation was addressed. In the main, the blame was laid upon decisions of the judiciary liberalizing and broadening judicial review of deportation and exclusion orders. Thus: "[W]hen the Supreme Court, in the case of Brownell against Rubinstein held that the Declaratory Judgment Act was applicable to deportation orders, a veritable Pandora's box was opened for the benefit of these wealthy racketeers under deportation orders who now shop from court to court. . ." (Mr. Walter); "A series of Federal court decisions has precipitated chaos in the channels of appellate procedure [which] . . . has been skillfully exploited by astute lawyers employed by subversive and criminal aliens" (Mr. Poff); review of exclusion orders by declaratory judgment "is unheard of, and was in this country unknown until the Supreme Court decided the Shung case in 1956" (Mr. Walter); "[I]n recent years, as a

result of judicial decision [citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, and *Brownell v. Rubinstein*, 346 U.S. 929], it has become possible for aliens to obtain judicial review of an order of deportation upon its issuance [by declaratory judgment]" (Mr. Walter); "[M]ultitudinous and repetitive court reviews [are] now available by virtue of judicial interpretations. . ." (Mr. Walter); "[T]his bending over backward [by the courts] to protect the individual has endangered the orderly administration of the law" (Mr. Hyde).[4]

Finally, in describing the advantages to be realized from the legislation, the bill's advocates focused principally upon provisions of the Act other than the direct review requirement. It is true that Mr. Walter stated in connection with several of the House bills that "[m]ost important, by eliminating review in the district courts, the bill would obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding." 107 Cong. Rec. 12176 (1961).[5] But in the con-

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[4] 107 Cong. Rec. 18286, 12176 (1961); 105 Cong. Rec. 12725 (1959); 104 Cong. Rec. 17172, 17175 (1958).

See also, *e.g.*, the following interchange:

> MR. HOFFMAN. I had in mind that case, I think it is the Green case, recently where Justice Frankfurter, writing for the minority, stated that the Court had gone off into a line of thinking where the right of the individual was being upheld at the expense of the right of all the people; that is to say, the individual had the edge on us and the rest of us had to take what was coming.
>
> MR. WALTER. May I call the attention of the gentlemen to the fact that for 80 years, I believe, habeas corpus was the only remedy, to the exclusion of others. It was not until quite recently, in the Shung case, that the Supreme Court held there was another remedy. . . .
>
> MR. HOFFMAN. What we used to believe since the coming of this new Supreme Court is in the discard. . . . [104 Cong. Rec. 17175-6 (1958).]

[5] He made the identical remark in connection with the 1958 and the 1959 House bills. 104 Cong. Rec. 17173 (1958), 105 Cong. Rec. 12726 (1959).

text of his full remarks it is clear that he meant that in his view this was the "most important" effect of the direct review provision, not that the direct review provision was the "most important" provision in the bill. Thus, this remark was followed by Mr. Walters' detailed listing of the "beneficial effects" of the bill, in which he identified the *res judicata* provision as the "most important" and relegated the direct review provision to a relatively subordinate position among the other features of the bill, including restriction of review of exclusion orders to habeas corpus actions, the statute of limitations, and the venue provision that would prevent forum-shopping.[6] In short, while Mr. Walters' statement, in contrast with the committee report, certainly supports the view that the Congress regarded the direct review

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[6] First. An alien who has been excluded. . . will have judicial review only by habeas corpus . . . . Such a [declaratory judgment] lawsuit is unheard of, and was in this country unknown until the Supreme Court decided the Shung case in 1956 . . . .

Second. Aliens . . . will be required to start their judicial review action within 6 months . . . .

Third. A deportable alien . . . will have an automatic stay of deportation, unless the court otherwise directs. It is hoped . . . that the courts of appeals will be very circumspect in granting such stays, as distinguished from district courts which are overwhelmed with work of various types . . . .

Fourth. The federal courts . . . will be relieved of a great burden . . . because excluded aliens will be restricted to habeas corpus proceedings instead of cluttering up the courts with lawsuits . . . . Deportable aliens will have to bring their action in courts of appeals, instead of the various district courts where they are now bringing the actions. Furthermore, the deportable alien will have to bring the suit in the vicinity where he lives or where the deportation proceedings was conducted. He will not be able to shop around, as at present and start his suit against the Government in a court such as the District of Columbia, for example, where the calendar is very crowded . . . .

Fifth. *Most important, the bill prevents repetitious court actions when the legal issues have once been previously disposed of.* [Emphasis added.] [107 Cong. Rec. 12176-7 (1961).]

See also the identical remarks addressed to the prior House bills at 105 Cong. Rec. 12726-7 (1959) and 104 Cong. Rec. 17173 (1958).

provision as an aid in expediting deportation cases, it does not support the view that the Congress regarded that provision as "primary," to use respondent's term, in the statutory scheme.

3. *Senate proceedings.* The proceedings in the Senate are unilluminating. The Senate bill that ultimately included Section 106 passed the Senate first as a statute to permit the entry of certain eligible alien orphans and for several other like forms of liberalization of the immigration laws. S.2237, 87th Cong., 1st Sess. See 107 Cong. Rec. 15660-15662 (1961). The House added Section 106 as an amendment and passed the bill. 107 Cong. Rec. 18281-18286 (1961). The Senate accepted the House amendments. 107 Cong. Rec. 19650-58 (1961).

Most of the Senate debate on the amended bill was occupied by a discussion of what some Senators regarded as the House's repeated practice of presenting to the Senate "at the end of a session . . . what amounts to a take-it-or-leave-it package" which "does some things which need to be done" and leaves other things undone—what "is properly called shotgun legislation on immigration" (Senators Keating and Javits) (107 Cong. Rec. 19652, 19654 (1961)). Senator Keating did state that the Senate Immigration and Naturalization Subcommittee of the Judiciary Committee had held hearings on the judicial review provision and that "every witness appearing testified in opposition," and in that connection he said that he would favor a one-year statute of limitations instead of 6 months, preservation of declaratory judgment actions in exclusion cases, and review by the district court rather than the court of appeals. *Id.*, at 19651, 19652. Others suggested that the review provisions might impose an undue financial burden on aliens. *Id.* at 19653. And Senator Eastland, who headed the Senate conferees, defended Section 106 briefly and ambiguously—*e.g.*, "As I understand it, this feature would be used probably seven or eight times a year in the case of big racketeers and subversives." *Id.*, at 19651; see also 19650, 19653. These com-

ments in combination account for all the discussion in the Senate respecting Section 106.

5. *Conclusion.* While we are inclined to discount the House committee report's treatment of Section 106 and to agree that the provision was designed to expedite the review of deportation cases, at the same time we think it clear that this provision was regarded by the Congress as but one of a group of devices tailored to that end, and not as important as some of the others. Therefore, to the extent this consideration is relevant, limiting the scope of Section 106(a) would not affect the "crucial" element in the legislative scheme.

APPENDIX

APPENDIX B

March 27, 1968

Charles Gordon, General Counsel
Immigration and Naturalization Service
HPS:PN:pb
39-62-269

Harold P. Shapiro, Chief, Administrative
Regulations Section, Criminal Division

Cheng Fan Kwok v. I.N.S.

Pursuant to your request for statistics on the volume of court cases under Section 106 of the Immigration and Nationality Act of 1952 as amended, 8 U.S.C. 1105a, we have prepared the attached analysis for the three-year period from March 1, 1965 to February 29, 1968.

During this period, 85 cases were brought in the District Court in a variety of actions including habeas corpus, injunction, and declaratory judgment. Cases in this category would generally be considered to have been properly brought in the District Court, for example habeas corpus petitions concerning bail or challenges to deportation orders more than six months after their entry. 243 petitions for review were filed in the Court of Appeals seeking review of a deportation order or other ancillary determination by a Special Inquiry Officer or the Board of Immigration Appeals as part of the deportation proceeding or by motion to reopen or reconsider. Thus, a total of 328 legal actions during this three-year period would not have been affected by the controversy presented in the present *Kwok* litigation. These cases are detailed in Part I of the attached statistics.

In contrast, 975 cases were brought challenging administrative determinations which, while not strictly part of the Section 242(b) deportation proceeding, may affect the validity or execution of the deportation order. These cases are set forth in Part II of the attachment. 834 of these cases sought review of denial by a District Director of a request

for a stay of deportation; 141 cases challenged other decisions, usually by the District Director, including the denial of a visa petition under Section 204 or a waiver under Section 212(e).

704 of the above 975 cases, however, involved aliens of Chinese ancestry who collectively only raised two or three substantive issues such as the implementation of the Section 203(a)(7) refugee provisions involved in the *Kwok* litigation or the authority of a Special Inquiry Officer to designate a country of deportation. Since scores of these cases are usually resolved by the decision in a single case, the actual burden imposed by these cases is less than their numbers might indicate and a separate category was created for the 271 cases which did not involve this Chinese multiple litigation—201 denials of stays of deportation and 70 other determinations. The final page is a breakdown of this category.

The cases counted in this study only involved some facet of deportation or some administrative action which would affect deportation or the alien's ability to reenter. Consequently, cases involving only exclusion, naturalization, revocation of naturalization, or other citizenship issues were not included.

The information contained in this study was extrapolated from a file card system maintained by our Immigration Unit. While it was not always possible to determine all of the details of each case from these cards, the general trends are clear, especially in light of the large time span and number of cases studied.

Attachments

Deportation Cases of First Impression
March 1, 1965 to February 29, 1968 Inclusive

Part I: Jurisdiction Undisputed

Circuit	District Court	Court of Appeals Section 106	Subtotals
1	0	8	8
2	48	64	112
3	3	7	10
4	1	1	2
5	8	14	22
6	3	12	15
7	1	43	44
8	2	1	3
9	15	88	103
10	0	0	0
DC	4	5	9
TOTAL	85	243	328

Part II: Jurisdiction in Question

Circuit	Stay by District Director	Other Administrative Decisions	Subtotals
1	4	1	5
	D.Ct. 1	D.Ct. 0	D.Ct. 1
	C.A. 3	C.A. 1	C.A. 4
2	598	79	677
	D.Ct. 438	D.Ct. 73	D.Ct. 511
	C.A. 160	C.A. 6	C.A. 166
3	130	12	142
	D.Ct. 2	D.Ct. 5	D.Ct. 7
	C.A. 128	C.A. 7	C.A. 135
4			0
5			0
6	2	4	6
	D.Ct. 2	D.Ct. 2	
	C.A. 0	C.A. 2	D.Ct. 4
			C.A. 2
7	88	14	102
	D.Ct. 3	D.Ct. 1	D.Ct. 4
	C.A. 85	C.A. 13	C.A. 98
8	2		2
	D.Ct. 0		D.Ct. 0
	C.A. 2		C.A. 2
9	8	17	25
	D.Ct. 5	D.Ct. 16	D.Ct. 21
	C.A. 3	C.A. 1	C.A. 4
10	1		1
	D.Ct. 1		D.Ct. 1
	C.A. 0		C.A. 0
DC	1	14	15
	D.Ct. 1	D.Ct. 14	D.Ct. 15
	C.A. 0	C.A. 0	C.A. 0
TOTAL	834	141	975
	D.Ct. 453	D.Ct. 111	D.Ct. 564
	C.A. 381	C.A. 30	C.A. 411
Non-Chinese	201	70	271

Part III: Totals For All Cases

Part I (undisputed jurisdiction) and
Part II (jurisdiction in question).

Circuit	Total-All Types
1	13
2	789
3	152
4	2
5	22
6	21
7	146
8	5
9	128
10	1
DC	24
TOTAL	1303

Part IV: Supplement

Chinese Multiple Litigation

Circuit	203(a)(7) etc.	S10 Authority to Designate Country	Subtotals
1			0
2	514	57	571
	D.Ct. 378	D.Ct. 57	D.Ct. 435
	C.A. 136	C.A. 0	C.A. 136
3	119	14	133
	D.Ct. 2	D.Ct. 2	D.Ct. 4
	C.A. 117	C.A. 12	C.A. 129
4			0
5			0
6			0
7			0
8			0
9			0
10			0
DC			0
TOTAL	633	71	704
	D.Ct. 380	D.Ct. 59	D.Ct. 439
	C.A. 253	C.A. 12	C.A. 265

APPENDIX C

MR. LINDSAY. One question on the subject of final orders of deportation and the 6 months' limitation on filing a petition for review following the final order of deportation: As the gentleman knows, the proposed bill provides that a petition for review may be filed not later than 6 months from the date of the final deportation order or from the date of this act, whichever is the later. Do I understand that that means that the 6-month period will not benefit the alien until the exhaustion of all the administrative remedies of whatever sort? Is that correct?

MR. WALTER. That is correct.

MR. LINDSAY. The gentleman knows that the immigration regulations are complicated and subject to change by the executive branch. The administrative review of orders of deportation sometimes can take different courses; so I would suggest that we make sure that the history of this is absolutely clear, that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final.

MR. WALTER. That is correct. The final order means the final administrative order.

MR. LINDSAY. I thank the gentleman.

* * *

MR. MOORE.

* * *

Opponents of this legislation raise one point which deserves further explanation.

They claim that in some cases aliens may be induced to file court proceedings for review of their deportation order even though they may qualify for administrative or legislative relief. Let me give an example. Under section 244 of the present Immigration and Nationality Act (8 U.S.C. sec. 1254) an alien against whom a final order of deportation is issued may under certain conditions have his deportation suspended and his status adjusted to that of an alien admitted for permanent residence. Ordinarily a request for sus-

pension of deportation under this section is not made until after the determination that the alien is deportable. However, since there is no provision for tolling the 6-month period of review under the bill because of such post-deportation proceedings, it is claimed that the alien may feel compelled to file his case in court even though he has a basis for administrative relief. And once a case is filed in court, the Immigration Service may be precluded from concurrently considering a request for administrative relief because of the exclusive jurisdiction of the court over the case.

These circumstances are admittedly undesirable. However, they are not irreparable. The alien does not forfeit any avenues of administrative relief, but at most, simply has to postpone their enforcement. I have concluded that the real remedy for this situation is to be sought in a change in the present administrative practice of considering the issues of deportability and suspension of deportation piecemeal. There is no reason why the Immigration Service could not change its regulations to permit contemporaneous court consideration of deportability and administrative application for relief. That would remove this objection entirely. I am hopeful that this matter will be given further study by the committee in the near future.

MR. LINDSAY. Mr. Speaker, will the gentleman yield?

MR. MOORE. I yield to the gentleman from New York.

MR. LINDSAY. A moment ago I asked the gentleman from Pennsylvania [Mr. Walter] whether or not it was correct to say that the 6 months period would not begin to run until after the exhaustion of all administrative remedies. In my question I assumed that suspension of deportation would be included as an administrative remedy. In other words, the question of deportability would be decided one way or the other. Assuming the alien was found to be deportable, then he goes back for further administrative relief. He asks for suspension of deportation proceedings. It may take a while before there is a determination on that question.

MR. MOORE. That is correct.

MR. LINDSAY. Is it not true that the words "final deportation order" does not take effect until after determination of the question of suspension?

MR. MOORE. That is the manner in which I understand the meaning of the term as used in the pending bill.

May I say to the Members of the House that in any event I do not believe that that should delay action on this imperatively necessary legislation. In my opinion, the good points far outweigh any technical objections that may be raised against it and I very strongly support the bill and urge its approval by the House.

MR. WALTER. Mr. Speaker, during the course of the discussion the gentleman from New York raised the question of suspension of deportation. I might say to the gentleman from New York that the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings. (105 Cong. Rec. 12728.)

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In the Supreme Court of the United States

OCTOBER TERM, 1967

CHENG FAN KWOK, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 638

CHENG FAN KWOK, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent joins petitioner in urging reversal of the decision below. An *amicus curiae* was appointed by this Court to support the judgment of the court of appeals (390 U.S. 918). Our principal brief was filed sufficiently early to permit the *amicus* to respond to the points there made. The instant paper is filed in reply to the brief of the *amicus*.

I. THE STATUTE IS NOT RESTRICTED TO THE REVIEW OF ORDERS RESULTING FROM QUASI-JUDICIAL ADMINISTRATIVE PROCEEDINGS

The *amicus* brief resurrects and elaborates the hypothesis that the exclusive review procedure prescribed by Section 106(a) of the Immigration and

Nationality Act relates only to determinations made in quasi-judicial proceedings. The only relevant authorities cited (Br., p. 31) to support this contention are three lower court cases whose holdings were effectively repudiated by this Court's decision in *Foti* v. *Immigration & Naturalization Service*, 375 U.S. 217. We submit that the view suggested misapprehends the statutory plan as well as the nature of the administrative process and of judicial review of administrative determinations, and that its acceptance would "not comport with the declared purpose of § 106(a) to eliminate the District Court stage of the judicial review process in an effort to prevent dilatory tactics" (*Foti*, 375 U.S. at 230).

Heavy reliance is placed on the Hobbs Act (now 28 U.S.C. 2341–2352), the procedures of which were in large measure adopted by reference in Section 106(a). The Hobbs Act deals with review of the decisions of regulatory agencies, which often develop voluminous records. Congress recognized in Section 106(a) that different procedural patterns are found in deportation cases, and prescribed explicit modifications of Hobbs Act procedures. But we do not urge these differences as controlling. On the contrary, it seems to us that the purposes behind the Hobbs Act and Section 106(a) are the same. This is confirmed by the legislative materials quoted by the *amicus* (Br., pp. 22–23), which speak of the need "to obtain a speedy settlement of disputed questions" portrayed in the administrative record, and of avoiding "the delay and expense consequent upon a lawsuit in the district court

and appeal from that court's action to the circuit court of appeals." The scope of judicial review described in these legislative materials is consistent with the historic pattern of review of administrative determinations, including those in immigration cases. It is also consistent with the specification in Section 106(a)(4) that "the petition shall be determined solely upon the administrative record." The protagonists of the Hobbs Act and of Section 106(a) were equally convinced that district court review would add nothing except "delay and expense."

The supporting cases cited by the *amicus* (Br., pp. 24–25) merely found that direct review would be inappropriate in the absence of an adequate record. That would certainly be true of any judicial review, whether it is sought in a court of appeals or a district court. Since the court's review ordinarily is confined to the record on which the administrative agency acted, an essential of such review is a record adequately showing the basis for the agency's determination. See *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167–168.

The error of the *amicus* brief, as we see it, is in assuming that an adequate administrative record can be developed only in a quasi-judicial hearing. In *Foti*, the Court specifically recognized "that deportability is conceded in a large number of cases," but stated that "this fact hardly detracts from our view as to a proper interpretation of § 106(a)" (375 U.S. at 227). Accordingly, review under Section 106(a), even under *Foti*, relates primarily to a variety of discretionary

determinations with regard to which the quasi-judicial hearing provisions of Section 242(b) are made applicable generally only by regulation, and not by statute, which limits the section's terms to determinations of deportability.

In addition, a subsidiary error of the *amicus* is the belief that "most determinations respecting discretionary relief are now passed upon in the Section 242(b) proceeding" (Br., p. 37). The fact is that during fiscal year 1967 there were 19,214 deportation hearings (1967 Annual Report, Immigration and Naturalization Service, p. 20), while there were 993,324 applications for various types of discretionary relief (*id.*, p. 7). The vast majority of such applications are adjudicated informally, through the submission of an application and supporting documents, followed by a determination by the appropriate district director (see, *e.g.*, 8 C.F.R. 204.1, 204.2, 212.7(a), 214.2(f) (2) and (3), (h), (j), 214.3). This informal procedure is fair, inexpensive and expeditious, and beneficial both to the applicant and the government. It also satisfies any applicable due process requirements. See *Montgomery* v. *Ffrench*, 299 F. 2d 730 (C.A. 8); *Ambra* v. *Ahrens*, 325 F. 2d 468, 471 (C.A. 5); *Maggibre Bakery, Inc.* v. *Esperdy*, 238 F. Supp. 374 (S.D.N.Y.); *Weiss* v. *Esperdy*, 27 F.R.D. 269 (S.D.N.Y.).

In passing upon such applications, the district director is required to give the applicant ample opportunity to substantiate his application, to advise him of adverse evidence, and to afford him an opportunity to present rebutting evidence (8 C.F.R. 103.2). When

there is an adverse decision it must be in writing, reciting specific reasons for the denial. And the applicant usually has an administrative appeal from such denials (8 C.F.R. 103.3). Moreover, when such a discretionary application is denied, the applicant can, and frequently does, challenge the denial in a judicial review proceeding. *E.g., Mendez* v. *Major*, 340 F. 2d 128 (C.A. 8) (denial of waiver to exchange visitor); *Mrvica* v. *Esperdy*, 376 U.S. 560 (denial of registry); *Skiftos* v. *Immigration & Naturalization Service*, 332 F. 2d 203 (C.A. 7) (denial of visa petition). The record before the court of appeals, whether on direct review or on appeal from a district court, is the record made in the informal administrative proceeding. This record, which fully depicts the basis for the administrative action, affords the courts an adequate opportunity to perform their function—usually to determine whether there was an error of law or an abuse of discretion. Instead of presenting difficulties for appellate courts, as the *amicus* brief supposes, such records are much less burdensome, since the issues are presented simply and clearly, and without the massive volume of materials customarily produced in the proceedings of regulatory agencies.

A basic fallacy in the *amicus* brief is the apparent assumption that district court review would add something of significance to the record which would be available for review by a court of appeals should an appeal ensue. Presumably, the thought is that the district court would be authorized to conduct some kind of evidentiary hearing. This is not so. Under the

statute, discretion is to be exercised by the Attorney General and not by the courts. *Hintopoulos* v. *Shaughnessy,* 353 U.S. 72; *Foti,* 375 U.S. at 228. Except as to non-frivolous claims to American citizenship (*Ng Fung Ho* v. *White,* 259 U.S. 276), a reviewing court has no authority to conduct a *de novo* hearing in reviewing a discretionary determination of the Attorney General. *Obrenovic* v. *Pilliod,* 282 F. 2d 874, 876 (C.A. 7). This concept is emphasized in Section 106(a)(4) and (5). Moreover, the Hobbs Act has additional provisions for remand to the agency or to a district court when clarification or amplification of the record is required (28 U.S.C. 2347(b) and (c)).

The unsoundness of the *amicus* brief's speculations is demonstrated when they are viewed against the actualities of the instant case. It is suggested (Br., pp. 27–28) that the record is sparse, but in fact it fully depicts the basis for the applicant's motion and the district director's determination. No enlargement of the record will result if the case is sent to the district court. On similar records, other courts of appeals have had no difficulty in assessing the administrative determinations. See *Mui* v. *Esperdy,* 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017; *Lee* v. *Immigration & Naturalization Service,* 375 F. 2d 723 (C.A. 9), certiorari denied, 389 U.S. 856. Moreover, the same kind of informal record would be considered by a court of appeals in reviewing antecedent determinations, which the *amicus* brief agrees should be reviewed along with the basic deportation order (p.

41). And here it seems manifest that, aside from the jurisdictional question, the court below could readily have decided this case, in which the merits had already been briefed and argued, on the record before it.

In these circumstances, we cannot see that any judicial or legislative purpose would be served, except to interpose another step of review, by initially relegating a case like the present one to a district court. That court would have to review the same record, and to consider the same briefs and arguments as a court of appeals. And after the district court had rendered its decision the case would in all likelihood be back in the court of appeals for its review on the basis of the same record.

In urging that the special inquiry officer's role is crucial, the *amicus* asserts that the district director is a "subordinate agency official" (Br., p. 28). This is inaccurate, since the district directors are important officials in the administrative organization, who are superior to the special inquiry officers in grade and authority, and have many adjudicative responsibilities. See 8 C.F.R. 103.1(f); 1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed. 1966), Sec. 1.9c. Pursuing the same theme, the *amicus* asserts that it is important to relate Section 106(a) to proceedings before a special inquiry officer because in such proceedings "the full range of procedural requirements of Section 242(b)" would be controlling (Br., p. 27). This is a demonstrably erroneous conception. If the regulations were amended to require that all applications for stays of deportation be addressed to the spe-

cial inquiry officer, he would act on substantially the same documents as those presented to the district director. The record reviewed by the court of appeals would be basically the same as that presented here, except that the administrative official making the initial decision would have a different title. Indeed, the same type of record is made in relation to motions to reopen, which are addressed to the special inquiry officer or the Board of Immigration Appeals and are reviewable by the court of appeals under *Giova* v. *Rosenberg,* 379 U.S. 18.[1] In each instance, whether reopening or stay is sought, there would be an application seeking to vitiate or delay the deportation order, and in passing on the application the official to whom it is presented would act on the papers submitted. There is hardly any justification for holding an evidentiary hearing whenever there is a motion to stay deportation or to reopen the proceedings. Such a consequence would produce far more obstruction and confusion in the deportation process than the bifurcated judicial review we are contesting here.

In summary, we believe the speculations regarding the need for a quasi-judicial hearing are strained and unsound. The important consideration, as we see it, is the need to effectuate the design of Section 106(a) "to abbreviate the process of judicial review of de-

[1] It is somewhat difficult to understand why the *amicus* finds our reliance on *Giova* "rather startling" (Br., p. 16). Albeit in a one-sentence *per curiam* opinion, *Giova* resolved the closely related question of the applicability of Section 106(a) to denials of motion to reopen in favor of review in the courts of appeals.

portation orders" (*Foti*, 375 U.S. at 224). This design can only be achieved, in our view, by reading the statute as requiring direct review in the court of appeals of determinations relating to or affecting the execution of deportation orders.

II. THE MOST SIGNIFICANT ASPECTS OF THE LEGISLATIVE HISTORY FAVOR RESPONDENT'S POSITION

Like the statutory language, the legislative history is neither wholly clear nor entirely satisfactory. We do not regard floor debates as the best guide to legislative intent, particularly when they do not deal directly with the question at issue. But we believe the *amicus* brief's examination of the legislative history has produced no credible evidence to support its hypothesis that Section 106(a) is concerned only with review of determinations made incident to quasi-judicial proceedings. On the contrary, as this Court's opinion in *Foti* demonstrates, the attention of Congress was focused primarily on preventing obstruction of deportation through dilatory judicial review rather than on the form of the administrative proceeding being reviewed. We would hardly regard Representative Walter's cursory response to Representative Libonati's uninformed question (Br., pp. 32–33) as evidence of anything. More persuasive, in our view, are the colloquies between Representatives Lindsay and Walter (set forth in Appendix C of the *amicus* brief), which assume that the final deportation order will include "further administrative relief" obtainable only after entry of the basic order.

The *amicus* dismisses (Br., p. 34) the reference chart in the House reports—a legislative summing-up which, in our view, weighs heavily against the suggested restrictive interpretation of the statute. Significantly, the *amicus* brief ignores this Court's reference to and reliance on that chart in *Foti* (375 U.S. at 226). Certainly, a chart appended to a Committee report dealing with judicial review of orders of deportation—described by the report as "a chart outlining administrative procedures in deportation cases" and captioned "Deportation Case Procedures"—cannot lightly be characterized as irrelevant to the legislative purpose. On the contrary, we submit that the chart constitutes direct and convincing evidence of the legislative aim to deal with the deportation process in its entirety and thus to forestall dilatory challenges to deportation orders.

Nor can we accept the *amicus'* disparagement (Br., pp. 45–46) of this Court's finding in *Foti* that the "key feature" of the legislative plan "was to abbreviate the process of judicial review of deportation orders" by eliminating review in the district courts. Obviously, Section 106 included other provisions; but there is no reasonable basis for disputing this Court's observations that "the declared purpose" (375 U.S. at 230) and "controlling intention" (*id.* at 232) of Congress were to vest exclusive jurisdiction in the courts of appeals. This objective is unmistakably expressed in Section 106(a)'s declaration that review in the courts of appeals "shall be the sole and exclusive procedure." It is likewise expressed in constantly repeated observations, in the Committee reports and the floor debates,

that in order to combat dilatory challenges to deportation orders, "a single, separate, statutory form of judicial review" was being created. In response to the *amicus* brief's surprising suggestion that Section 106(a) was not primarily aimed at expedition (Br., p. A–1), we invite attention to Representative Walter's exposition in the House Hearings on his bill. He remarked that the bill would set up "a single, expeditious, and fair method of judicial review in accordance with the time-tested" Hobbs Act, and stated: "What is important is to expedite the final decision on any such claim, once and for all" (House Hearings, cited in our principal brief, p. 12, n. 7). There are many similar expressions throughout the legislative history.

III. ADOPTION OF THE RESTRICTIVE VIEW WOULD EFFECTIVELY DEFEAT THE CONGRESSIONAL PURPOSE

In supporting a restrictive reading of the statute, the *amicus* brief offers a number of suggestions to avert the undesirable practical consequences which would result. We respectfully submit that these suggestions are in the main unrealistic and unsound.

The suggestions are preceded by two erroneous assumptions. First is the statement that when there are issues of fact the case can be remanded to the district court for trial *de novo* (Br., pp. 36–37). We have already observed that this is not so, since judicial review is confined to the administrative record, save for the exceptional situation, recognized in Section 106(a), when a trial *de novo* is required on a nonfrivolous claim of American citizenship. In the extremely rare situations where amplification or clarification of the record is required, the case is remanded

to the administrative agency for this purpose. See *Tejeda* v. *Immigration & Naturalization Service,* 346 F. 2d 389 (C.A. 9); *Attorney General* v. *Bufalino,* 371 F. 2d 738 (C.A.D.C.).

Moreover, we fail to grasp the point of the argument (Br., p. 37) that district court review is still allowed in habeas corpus proceedings, as recognized by the statute and required by the Constitution. Since earlier judicial review has been afforded through other remedies, habeas corpus proceedings are now infrequent (see Br., pp. B–1, B–3). Moreover, Section 106(a) contains safeguards against repetitious review in habeas corpus proceedings. The examples of district court review given by the *amicus* brief represent a minute proportion, rather than a "large block," of the total volume of judicial review proceedings. In any event, the possibility of district court review in rare cases hardly means that it should be extended to other cases, contrary to the design of Section 106(a).

The second erroneous assumption of the *amicus* is that "much less is at stake in this case than was in *Foti* * * * since by regulation most determinations respecting discretionary relief are now passed upon in the Section 242(b) proceeding" (Br., p. 37). We have already demonstrated the fallacy of this assumption. Moreover, it is also a fact, evidenced by Appendix B to the *amicus* brief, that the heavy preponderance of current litigation is concerned with challenges to ancillary determinations such as that presented here. In large measure, the dilatory obstructions to the execution of deportation orders currently occur

incident to judicial review relative to such ancillary determinations.

The *amicus* brief shares the view of the Ninth Circuit that all problems of interpretation could be solved by amending the regulations to consolidate all issues in one proceeding. And it urges (Br., pp. 43–44) that the Court should read Section 106(a) restrictively, so that respondent "will have an incentive to amend its regulations." We doubt that this proposal offers a rational basis for interpreting the statute. We discuss in our principal brief (pp. 39–43) the practical obstacles to a complete consolidation of procedures. Moreover, we fail to see how a requirement that a motion to stay deportation must be considered by a special inquiry officer rather than a district director alters its relationship to the deportation order or serves any relevant need.

The *amicus* brief also suggests (p. 38) that the regulations could be amended to provide an appeal to a special inquiry officer from a district director's adverse decision, and an additional appeal to the Board of Immigration Appeals, "with all of the procedures of Section 242(b) coming into play at that point." But this would involve the type of dilatory procedure which is patently undesirable in connection with last-minute motions to stay deportation. It is obvious that such a procedure would have serious consequences for the effective enforcement of the deportation laws. Its acceptance would mean that one who, like petitioner, has had full hearings and appeals and who finally is faced with deportation could be assured of a new

round of administrative hearings and appeals merely by filing a motion to stay deportation. Such a proposal would proliferate the delays in executing deportation orders, instead of minimizing them.[2]

Finally, we note the *amicus'* statement (Br., p. 44) that the view espoused should be adopted in order to promote "a simple and clear rule." If that were the critical consideration, it would have been an easy matter to subscribe to the lower court's approach in *Foti,* which was equally "simple and clear." A more relevant criterion, we submit, is whether the rule accomplishes the statutory goals. Nor do we acknowledge that the approach proposed in our principal brief is not equally "simple and clear." In any event, that approach at least has the added virtue, in our view, of fulfilling the statutory plan of minimizing dilatory

[2] We shall not comment extensively on the *amicus* brief's proposals regarding the problem of bifurcated review (Br., pp. 39–42), except to note our belief that the suggested solutions generally are unworkable. The *amicus* brief is mistaken in suggesting that district court review would necessarily be in the same circuit as review under Section 106(a), and that our principal brief cited no examples of bifurcated review. We cited two examples of bifurcated review proceedings against the Attorney General in the District of Columbia. Additional examples could have been cited, and more such review proceedings against the Attorney General in the District Court of the District of Columbia doubtless would result from a decision upholding the view of the court below.

judicial review which obstructs the execution of deportation orders.[3]

Respectfully submitted.

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Immigration and Naturalization Service.

APRIL 1968.

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[3] It should be noted that, on March 21, 1968, the Court of Appeals for the District of Columbia affirmed the district court judgment of dismissal in *DeLucia* v. *Attorney General*, No. 21,030 (C.A.D.C.) (discussed extensively at p. 28, n. 15, of our principal brief), making that court one of those favoring the broad interpretation of Section 106(a) which we here urge. In that case the court's brief opinion referred to this Court's decisions in *Foti* and *Giova*, and then stated:

> Thus, the act by the Chicago District Director which appellant seeks to review is clearly subject to the limitation on judicial review of § 106(a) and can only be considered by the Court of Appeals for the Seventh Circuit.

It should also be noted that a petition for certiorari was recently filed in *DeLucia* (No. 1358, this Term).

U. S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT OF THE UNITED STATES

No. 638.—October Term, 1967.

Cheng Fan Kwok, Petitioner, *v.* Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 10, 1968.]

Mr. Justice Harlan delivered the opinion of the Court.

The narrow question presented by this case is whether jurisdiction to review the denial of a stay of deportation, if the pertinent order has not been entered in the course of a proceeding conducted under § 242 (b) of the Immigration and Nationality Act, 8 U. S. C. § 1252 (b), is, under § 106 (a) of the Act, 8 U. S. C. § 1105a (a), vested exclusively in the courts of appeals.[1] The question arises from the following circumstances.

Petitioner, a native and citizen of China, evidently entered the United States in 1965 as a seaman.[2] The terms of his entry permitted him to remain in this country for the period during which his vessel was in port, provided that this did not exceed 29 days. See 8 U. S. C. § 1282 (a).[3] He deserted his vessel, and remained unlaw-

[1] We emphasize that no questions are presented as to petitioner's deportability or as to the propriety in his situation of any discretionary relief. We intimate no views on any such questions.

[2] The facts concerning petitioner's entry into, and subsequent stay in, the United States appear to have been conceded in the proceeding before the special inquiry officer.

[3] Section 1282 (a) provides in relevant part that "(a) No alien crewman shall be permitted to land temporarily in the United States except . . . for a period of time, in any event, not to exceed—(1) the period of time (not exceeding twenty-nine days) during which the vessel . . . remains in port . . . ."

fully in the United States. After petitioner's eventual apprehension, deportation proceedings were conducted by a special inquiry officer under the authority of § 242 (b). Petitioner conceded his deportability, but sought and obtained permission to depart the United States voluntarily.[4] Despite his protestations of good faith, petitioner did not voluntarily depart, and was ultimately ordered to surrender for deportation. He then requested a stay of deportation from a district director of immigration, pending the submission and disposition of an application for adjustment of status under 8 U. S. C. § 1153 (a)(7).[5] The district director concluded that petitioner is ineligible for such an adjustment of status, and denied a stay of deportation.

Petitioner thereupon commenced these proceedings in the Court of Appeals for the Third Circuit, petitioning for review of the denial of a stay. The Court of Appeals held that the provisions of § 106 (a), under which it would otherwise have exclusive jurisdiction to review the district director's order, are inapplicable to orders denying ancillary relief unless those orders either are entered in the course of a proceeding conducted under § 242 (b), or are denials of motions to reopen such proceedings.

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[4] We note, as we did in *Foti* v. *Immigration Service*, 375 U. S. 217, that the "granting of voluntary departure relief does not result in the alien's not being subject to an outstanding final order of deportation." *Id.*, at 219, n. 1.

[5] Section 1153 (a)(7) provides in part that "[c]onditional entries shall next be made available . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . that (i) because of persecution or fear of persecution . . . they have fled . . . from any Communist or Communist-dominated country . . . ." Conditional entries are available only to refugees, and, like the parole system, grant "temporary harborage in this country for humane considerations or for reasons rooted in the public interest." C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.54 (1967). See also *id.*, at § 2.27h.

The court dismissed the petition for want of jurisdiction. 381 F. 2d 542. We granted certiorari because the courts of appeals have disagreed as to the proper construction of the pertinent statutory provisions.[6] 390 U. S. 918. For reasons that follow, we affirm.

I.

It is useful first to summarize the relevant provisions of the Immigration and Nationality Act and of the regulations promulgated under the Act's authority. Section 242 (b) provides a detailed administrative procedure for determining whether an alien may be deported. It permits the entry of an order of deportation only upon the basis of a record made in a proceeding before a special inquiry officer, at which the alien is assured rights to counsel, to a reasonable opportunity to examine the evidence against him, to cross-examine witnesses, and to present evidence in his own behalf. By regulation, various forms of discretionary relief may also be sought from the special inquiry officer in the course of the deportation proceeding; an alien may, for example, request that his deportation be temporarily withheld, on the ground that he might, in the country to which he is to be deported, "be subject to physical persecution . . . ." See 8 U. S. C. § 1253 (h); 8 CFR § 242.8 (a).

Other forms of discretionary relief may be requested after termination of the deportation proceeding. The regulations thus provide that an alien "under a final

[6] Compare the following: *Skiftos* v. *Immigration & Naturalization Service*, 332 F. 2d 203 (C. A. 7th Cir.); *Talavera* v. *Pederson*, 334 F. 2d 52 (C. A. 6th Cir.); *Samala* v. *Immigration & Naturalization Service*, 336 F. 2d 7 (C. A. 5th Cir.); *Mendez* v. *Major*, 340 F. 2d 128 (C. A. 8th Cir.); *Melone* v. *Immigration & Naturalization Service*, 355 F. 2d 533 (C. A. 7th Cir.); *Mui* v. *Esperdy*, 371 F. 2d 772 (C. A. 2d Cir.); *Yanaka* v. *Immigration & Naturalization Service*, 384 F. 2d 214 (C. A. 9th Cir.); *De Lucia* v. *Attorney General*, — App. D. C. —, — F. 2d — (C. A. D. C. Cir.).

administrative order of deportation" may apply to the district director "having jurisdiction over the place where the alien is at the time of filing" for a stay of deportation. 8 CFR § 243.4. The stay may be granted by the district director "in his discretion." *Ibid.* If the stay is denied, the denial "is not appealable" to the Board of Immigration Appeals. *Ibid.*

Section 106 (a)[7] provides that the procedures for judicial review prescribed by the Hobbs Act, 64 Stat. 1129, 68 Stat. 961, "shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens . . . pursuant to administrative proceedings under section 242 (b) of this Act . . . ." These procedures vest in the courts of appeals exclusive jurisdiction to review final orders issued by specified federal agencies. In situations to which the provisions of § 106 (a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court.

The positions of the various parties may be summarized as follows. We are urged by both petitioner and the Immigration Service to hold that the provisions of § 106 (a) are applicable to the circumstances presented by this case, and that judicial review thus is available only in the courts of appeals. The Immigration Service contends that § 106 (a) should be understood to embrace all determinations "directly affecting the execution of the basic deportation order," whether those determinations have been reached prior to, during, or subsequent to the deportation proceeding.[8] In contrast, *amicus*[9]

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[7] Section 106 (a), 8 U. S. C. § 1105a (a), was added to the Immigration Act by § 5 (a) of Public Law 87–301, approved September 26, 1961, 75 Stat. 651.

[8] Brief for Respondent 28.

[9] Since the Immigration Service had aligned itself with petitioner on this question, the Court invited William H. Dempsey, Jr., Esquire,

urges, as the Court of Appeals held, that § 106 (a) encompasses only those orders made in the course of a proceeding conducted under § 242 (b) or issued upon motions to reopen such proceedings.

II.

This is the third case in which we have had occasion to examine the effect of § 106 (a). In the first, *Foti* v. *Immigration Service*, 375 U. S. 217, the petitioner, in the course of a proceeding conducted under § 242 (b), conceded his deportability but requested a suspension of deportation under § 244 (a)(5). The special inquiry officer denied such a suspension, and petitioner's appeal from the denial was dismissed by the Board of Immigration Appeals. Petitioner commenced an action in the district court, but the action was dismissed on the ground that, under § 106 (a), his exclusive remedy lay in the courts of appeals. He then petitioned for review to the Court of Appeals for the Second Circuit, but it dismissed for want of jurisdiction. A divided court held *en banc* that the procedures of § 106 (a) were inapplicable to denials of discretionary relief under § 244 (a)(5). 308 F. 2d 779. On certiorari, we reversed, holding that "all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals . . . are . . . included within the exclusive jurisdiction of the Court of Appeals under § 106 (a)." 375 U. S., at 229.

In the second case, *Giova* v. *Rosenberg*, 379 U. S. 18, petitioner moved before the Board of Immigration Appeals to reopen proceedings, previously conducted under § 242 (b), that had terminated in an order for his deportation. The Board denied relief. The Court of Appeals

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a member of the Bar of this Court, to appear and present oral argument as *amicus curiae* in support of the judgment below. 390 U. S. 918.

for the Ninth Circuit concluded that the Board's denial was not embraced by § 106 (a), and dismissed the petition for want of jurisdiction. 308 F. 2d 347. On certiorari, this Court held, in a brief *per curiam* opinion, that such orders were within the exclusive jurisdiction of the courts of appeals.

Although *Foti* strongly suggests the result that we reach today, neither it nor *Giova* can properly be regarded as controlling in this situation. Unlike the order in *Foti*, the order in this case was not entered in the course of a proceeding conducted by a special inquiry officer under § 242 (b); unlike the order in *Giova*, the order here did not deny a motion to reopen such a proceeding. We regard the issue of statutory construction involved here as markedly closer than the questions presented in those cases; at the least, it is plainly an isssue upon which differing views may readily be entertained. In these circumstances, it is imperative, if we are accurately to implement Congress' purposes, to "seiz[e] everything from which aid can be derived." *Fisher* v. *Blight*, 2 Cranch 358, 386.

It is important, first, to emphasize the character of the statute with which we are concerned. Section 106 (a) is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes. *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44. Further, as a statute addressed entirely to "specialists," it must, as Mr. Justice Frankfurter observed, "be read by judges with the minds of . . . specialists." [10]

We cannot, upon close reading, easily reconcile the position urged by the Immigration Service with the terms

[10] Frankfurter, Some Reflections on the Reading of Statutes, 2 Rec. of Assoc. of Bar of City of N. Y. 213, 225.

of § 106 (a). A denial by a district director of a stay of deportation is not literally a "final order of deportation," nor is it, as was the order in *Foti*, entered in the course of administrative proceedings conducted under § 242 (b).[11] Thus, the order in this case was issued more than three months after the entry of the final order of deportation,[12] in proceedings entirely distinct from those conducted under § 242 (b), by an officer other than the special inquiry officer who, as required by § 242 (b), presided over the deportation proceeding. The order here did not involve the denial of a motion to reopen

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[11] We find the emphasis placed in dissent upon the word "pursuant" in § 106 (a) unpersuasive. First, § 106 (a) was evidently limited to those final orders of deportation made "pursuant to administrative proceedings under section 242 (b)" simply because Congress preferred to exclude from it those deportation orders entered without a § 242 (b) proceeding. This would, for example, place orders issued under 8 U. S. C. § 1282 (b), by which the Immigration Service may revoke a seaman's conditional permit to land and deport him, outside the judicial review procedures of § 106 (a). See generally C. Gordon & H. Rosenfield, Immigration Law and Procedure § 5.11 (1967). Perhaps this suggests, as *amicus* urges, that § 106 (a) was intended to be limited to situations in which quasi-judicial proceedings, such as those under § 242 (b), have been conducted. It certainly indicates that the reference in § 106 (a) to § 242 (b) proceedings was intended to limit, and not to broaden, the classes of orders to which § 106 (a) may be applied. Second, it must be reiterated that § 106 (a) does not, as the dissenting opinion suggests, encompass "all orders" entered pursuant to § 242 (b) proceedings; it is limited to "final orders of deportation." The textual difficulty, with which the dissenting opinion does not deal, is that the order in question here neither is a final order of deportation, nor is it, as was the order in *Foti*, "made during the same proceedings" in which a final order of deportation has been issued. 375 U. S., at 224. This cannot be overcome merely by examination of the meaning of the word "pursuant."

[12] The special inquiry officers' decision, which established deportability and granted voluntary departure, was issued on March 3, 1966. Petitioner filed his application for a stay on June 20, 1966. The application was evidently denied on the same day.

proceedings conducted under § 242 (b), or to reconsider any final order of deportation. Concededly, the application for a stay assumed the prior existence of an order of deportation, but petitioner did not "attack the deportation order itself but instead [sought] relief not inconsistent with it." *Mui* v. *Esperdy*, 371 F. 2d 772, 777. If, as the Immigration Service urges, § 106 (a) embraces all determinations "directly affecting the execution of a final deportation order," Congress has selected language remarkably inapposite for its purpose. As Judge Friendly observed in a similar case, if "Congress had wanted to go that far, presumably it would have known how to say so." *Id.*, at 779.

The legislative history of § 106 (a) does not strengthen the position of the Immigration Service. The "basic purpose" of the procedural portions of the 1961 legislation was, as we stated in *Foti*, evidently "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts . . . ." 375 U. S., at 226. Congress prescribed for this purpose several procedural innovations, among them the device of direct petitions for review to the courts of appeals. Although, as the Immigration Service has emphasized, the broad purposes of the legislation might have been expected to encompass orders denying discretionary relief entered outside § 242 (b) proceedings, there is evidence that Congress deliberately restricted the application of § 106 (a) to orders made in the course of proceedings conducted under § 242 (b).

Thus, during a colloquy on the floor of the House of Representatives, to which we referred in *Foti*,[13] Representative Moore, co-sponsor of the bill then under discussion, suggested that any difficulties resulting from the separate consideration of deportability and of discretion-

[13] See 375 U. S., at 223–224.

ary relief could be overcome by "a change in the present administrative practice of considering the issues . . . piecemeal. There is no reason why the Immigration Service could not change its regulations to permit contemporaneous court consideration of deportability and administrative application for relief." 105 Cong. Rec. 12728. In the same colloquy, Representative Walter, the chairman of the subcommittee that conducted the pertinent hearings, recognized that certain forms of discretionary relief may be requested in the course of a deportation proceeding, and stated that § 106 (a) would apply to the disposition of such requests, "just as it would apply to any other issue *brought up in deportation proceedings.*" 105 Cong. Rec. 12728 (emphasis added). Similarly, Representative Walter, in a subsequent debate, responded to a charge that judicial review under § 106 (a) would prove inadequate because of the absence of a suitable record, by inviting "the gentleman's attention to the law in section 242, in which the procedure for the examiner is set forth in detail." 107 Cong. Rec. 12179.

We believe that, in combination with the terms of § 106 (a) itself, these statements lead to the inference that Congress quite deliberately restricted the application of § 106 (a) to orders entered during proceedings conducted under § 242 (b), or directly challenging deportation orders themselves.[14] This is concededly "a choice between uncertainties," but we are "content to choose the lesser." *Burnet* v. *Guggenheim*, 288 U. S. 280, 288.

We need not speculate as to Congress' purposes. Quite possibly, as Judge Browning has persuasively sug-

[14] The Immigration Service has argued that the limiting language in § 106 (a) may be explained by Congress' wish to restrict its application to deportation cases, preventing its application to questions arising from exclusion proceedings. We have found nothing in the pertinent legislative history that offers meaningful support to this view.

gested, "Congress visualized a single administrative proceeding in which all questions relating to an alien's deportation would be raised and resolved, followed by a single petition in a court of appeals for judicial review . . . ." *Yamada* v. *Immigration & Naturalization Service*, 384 F. 2d 214, 218. It may therefore be that Congress expected the Immigration Service to include within the § 242 (b) proceeding "all issues which might affect deportation." *Ibid.* Possibly, as *amicus* cogently urges, Congress wished to limit petitions to the courts of appeals to situations in which quasi-judicial hearings had been conducted.[15] It is enough to emphasize that neither of these purposes would be in any fashion impeded by the results we reach today. We hold that the judicial review provisions of § 106 (a) embrace only those determinations made during a proceeding conducted under § 242 (b), including those determinations made incident to a motion to reopen such proceedings.[16]

This result is entirely consistent with our opinion in *Foti*. There, it was repeatedly stated in the opinion of THE CHIEF JUSTICE that the order held reviewable under § 106 (a) had, as the regulations required, been entered in the course of a proceeding conducted under § 242 (b). 375 U. S., at 218, 222–223, 224, 226, 228, 229, 232. It was emphasized that "the administrative discretion to grant a suspension of deportation," the determination involved in *Foti*, "has historically been consistently exercised as an integral part of the proceedings which have led to the issuance of a final deportation order." *Id.*,

[15] Note, *e. g.*, the apparent exclusion from § 106 (a) of orders entered under § 1282 (b). See generally, *supra*, at n. 11.

[16] We intimate no views on the possibility that a court of appeals might have "pendent jurisdiction" over denials of discretionary relief, where it already has before it a petition for review from a proceeding conducted under § 242 (b). See *Foti* v. *Immigration Service*, *supra*, at 227, n. 14.

at 223. A suspension of deportation "must be requested prior to or during the deportation hearing." *Ibid.* Moreover, it was explicitly recognized that, although modification of the pertinent regulations might "effectively broaden or narrow the scope of review available in the Courts of Appeals," this was "nothing anomalous." [17] *Id.*, at 229–230. An essential premise of *Foti* was thus that the application of § 106 (a) had been limited to orders "made during the same proceedings in which deportability is determined . . . ." *Id.*, at 224.

The *per curiam* opinion in *Giova* did not take a wider view of § 106 (a). The denial of an application to reopen a deportation proceeding is readily distinguishable from a denial of a stay of deportation, in which there is no attack upon the deportation order or upon the proceeding in which it was entered. Petitions to reopen, like motions for rehearing or reconsideration, are, as the Immigration Service urged in *Foti*, "intimately and immediately associated" with the final orders they seek to challenge.[18] Thus, petitions to reopen deportation proceedings are governed by the regulations applicable to the deportation proceeding itself, and, indeed, are ordinarily presented for disposition to the special inquiry officer who entered the deportation order.[19] The result in *Giova* was thus a logical concomitant of the construction of § 106 (a) reached in *Foti*; it did not,

[17] The opinion of the Court emphasized, in addition, that "[c]learly, changes in administrative procedures may affect the scope and content of various types of agency orders and thus the subject matter embraced in a judicial proceedings to review such orders." *Id.*, at 230, n. 16.

[18] Brief for Respondent, No. 28, October Term 1963, at 53.

[19] See 8 CFR § 242.22. If, however, the order of the special inquiry officer is appealed to the Board of Immigration Appeals, a subsequent motion to reopen or reconsider is presented to the Board for disposition. *Ibid.* The motion in *Giova* was presented to the the Board and decided by it.

explicitly or by implication, broaden that construction in any fashion that encompasses this situation.

The result we reach today will doubtless mean that, on occasion, the review of denials of discretionary relief will be conducted separately from the review of an order of deportation involving the same alien. Nonetheless, this does not seem an onerous burden, nor is it one that cannot be avoided, at least in large part, by appropriate action of the Immigration Service itself. More important, although "there is no table of logarithms for statutory construction," [20] it is the result that we believe most consistent both with Congress' intentions and with the terms by which it has chosen to express those intentions.

Affirmed.

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[20] Frankfurter, Some Reflections on the Reading of Statutes, *supra*, at 234.

SUPREME COURT OF THE UNITED STATES

No. 638.—October Term, 1967.

Cheng Fan Kwok, Petitioner, v. Immigration and Naturalization Service. } On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 10, 1968.]

Mr. Justice White, dissenting.

If the special inquiry officer had possessed jurisdiction to issue a stay order pending petitioner's efforts to obtain dicretionary relief from the District Director, I take it that his denial of the stay, like a refusal to re-open, would have been appealable to the Court of Appeals. But, as I understand it, no stay could have been granted by the hearing officer and it was sought from the District Director as an immediate consequence of there being outstanding a final order of deportation, which, if executed, might moot the underlying request for relief from the District Director. Section 106 does not limit judicial review in the Court of Appeals to orders entered "in the course of" § 242 (b) proceedings, but extends it to all orders against aliens entered "pursuant" to such proceedings, that is, at least as Webster would have it,* "acting or done in consequence" of the § 242 (b) proceedings. Except for the order of deportation, there would have been no occasion or need to seek a stay. It hardly strains congressional intention to give the word "pursuant" its ordinary meaning in the English language. If there are reasons based on policy for the Court's contrary conclusion, they are not stated. I would reverse the judgment.

* Merriam-Webster, Webster's New International Dictionary, Second Edition, unabridged (1957), defines "pursuant" as:

"1. Acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according; . . .

"2. That is in pursuit or pursuing; . . ."